FILED
JAN 8 2001
OFFICE OF THE CLERK

No. 00-121

IN THE

Supreme Court of the United States

GEORGE DUNCAN,

Petitioner,

v.

SHERMAN WALKER,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 21, 2000
CERTIORARI GRANTED NOVEMBER 13, 2000

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RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDIV HEARD
CLOSED C90207
PNL K05 2 Y

GENERAL DOCKET FOR
Second Circuit Court of Appeals

Court of Appeals Docket #: 98-2572 Filed: 6/24/98
Nsuit: 3530 PRISONER PET-Habeas Corpus
Walker v. Artuz
Appeal from: U.S. District Court EDNY

Case type information:
1) Prisoner Petition
2) State
3) Habeas Corpus

Lower court information:

District: 0207-01: 97-cv-3397
Trial Judge: Sterling Johnson, Jr.
Magistrate Judge: Aaron Simon Chrein
Date Filed: 6/10/97
Date order/judgment: 5/18/98
Date NOA filed: 6/19/98

Fee status: ifp granted

Relevant Docket Entries — Court of Appeals

Prior cases:
None
Current cases:
None

Panel Assignment:
Panel: JMW PNL RSP 1705 :CA2 9/15/99 am
Date of decision: 3/27/00

Proceedings include all events.
98-2572 Walker v. Artuz

SHERMAN WALKER
Petitioner – Appellant

Sherman Walker
#92-A-7141
[COR LD NTC]
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Deborah Wolikow Loewenberg, Esq.
914-638-4747
[COR LD NTC cja]
155 N. Main St.
New City, NY 10956

v.

Relevant Docket Entries — Court of Appeals

CHRISTOPHER ARTUZ, Superintendent
Respondent – Appellee

Mary Lynn Nicolas, Esq.
212-416-6197
[COR LD NTC ret]
25th floor
Attorney General's Office
State of New York
120 Broadway
New York, NY 10271

Official Caption[1]

Docket No. [s]: 98-2572

SHERMAN WALKER,

Petitioner – Appellant,

v.

CHRISTOPHER ARTUZ, Superintendent,

Respondent – Appellee.

Authorized Abbreviated Caption[2]

Docket No. [s]: 98-2572

Walker v. Artuz

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1. Fed. R. App. P. Rule 12[a] and 32[a].

2. For use on correspondence and motions only.

Relevant Docket Entries — Court of Appeals

6/24/98	Copy of notice of appeal and district court docket entries on behalf of Appellant Sherman Walker, filed. (COADN; state – hc; fee ifp). [98-2572] (1135)
6/24/98	Note: This appeal was PRO SE when filed. (1135)
6/24/98	Copy of district court memorandum and order dismissing the petition for failure to present a substantial showing of the denial of a constitutional right, dated May 6, 1998, endorsed by Hon. Sterling Johnson, Jr., U.S.D.J., filed. (1135)
6/24/98	Copy of district court Judgment dismissing the petition as time barred, endorsed by Hon. Robert C. Heinemann, Clerk of Court, filed. (1135)
6/24/98	Record on appeal filed. (Original papers of district court.) Number of volumes: 1 (1135)
6/24/98	Notice of appeal CONSTRUED as a motion for certificate of appealability on behalf of Appellant Sherman Walker, filed. [1210872-1] (1135)
7/1/98	Letter requesting State Court proceedings and transcripts sent to BKNY/EDNY appeals clerk. State Court proceedings due on 7/13/98. (1135)
7/13/98	Notice of appeal acknowledgment letter from Efrem Z. Fisher for Appellee Christopher Artuz received. (in04)

Relevant Docket Entries — Court of Appeals

7/23/98	Letter received, dated 7/16/98 from Mary Ann McGee, Appeal's Clerk, E.D.N.Y, advising case manager to contact the Assistant District Attorney's office for State Court Record on time-barred cases. (1135)
7/23/98	Letter received from Appellant Marc Pelta requesting an extension of time to submit acknowledgment letter. (pr28)
8/4/98	Notice of appeal acknowledgment letter from Sherman Walker for Appellant Sherman Walker received. (pr20)
8/4/98	Notice of appearance form on behalf of Sherman Walker, received. (Orig. to Calendar) (pr20)
8/13/98	Letter received from Marion R. Buchbinder, Assistant Attorney General dated 8/11/98 re: change of counsel for respondent. (pr28)
8/25/98	Letter requesting State Court proceedings and transcripts sent to Dennis C. Vacco for Appellee Christopher Artuz. State Court proceedings due on 9/4/98. (1135)
9/1/98	State Court Proceedings lodged. (Please return to: Efrem Z. Fischer at Attorney General Office, 120 Broadway, New York, N.Y. 10271-0332). St.Ct proceedings deadline satisfied. (pr28)
12/18/98	Order FILED GRANTING motion for certificate of appealability [1210872-1] by Appellant

Sherman Walker, endorsed on motion form dated 6/24/98. "A motion having been made herein by petitioner-appellant pro se for a certificate of appealability, upon consideration thereof, it is ordered that said motion be and it hereby is granted. The parties are ordered to brief the following issues: (1) whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C. sec. 2254 tolled the period of limitations set forth in 28 U.S.C. sec. 2244(d)(2), and (2) whether the limitations period in Section 2244(d) may be equitably tolled where the prior, timely-filed section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in Ross v. Artuz, 150 F.3d 97 (2d cir. 1998) It is further ordered that counsel be appointed to represent the petitioner-appellant. (JLO, DJ, RSP, C.J.) (endorsed by LC) (pr28)

12/18/98 Certified copy of the order, dated 12/18/98 issued to the district court. (pr28)

12/21/98 Notice to all parties of Order dated 12/18/98. (pr28)

1/4/99 Certified copy of Mandate dated 12/18/98 receipt returned from the district court. (pr28)

Relevant Docket Entries — Court of Appeals

1/5/99	Order appointing Deborah W. Loewenberg, Esq. for pro se appellant pursuant to CJA filed. Voucher#: 0668739 [Copies mailed to counsel and AO] (pr28)
1/5/99	CJA voucher issued to counsel: Deborah W. Loewenberg, Esq. for Sherman Walker (Voucher #: 0668739) [98-2572] (pr28)
1/5/99	Scheduling order no. 1 filed, continuing/appointing counsel: Deborah W. Loewenberg, Esq. pursuant to CJA. Appellant/Pet brief jt appendix due on 3/8/99. Appellee/Respondent brief due on 4/7/99. Response to Anders brief due on 3/22/99. Argument as early as week of 5/24/99. (pr28)
1/5/99	Notice to all parties of scheduling order #1 issued on 1/5/99. (pr28)
3/3/99	Letter received from Deborah Wolikow Loeweneberg, dated 3/2/99 re: enclosed an original motion for an enlargement of time to perfect Appellant's appeal with four copies of the moving papers and an original affidavit of service. (pr28)
3/3/99	Appellant Sherman Walker motion to extend time to Enlargment of time to serve and file brief by April 8, 1999, FILED (w/pfs). [1352688-1] (pr28)

Relevant Docket Entries — Court of Appeals

3/8/99	Order FILED GRANTING motion for extended time [1352688-1] by Appellant Sherman Walker, endorsed on motion form dated 3/3/99. Extended appellant's brief due date is 3/19/99. Extended appellee's brief due date is 4/19/99. Extended argument week as early as 6/1/99. (LG) (am)
3/8/99	Notice to counsel: Order filed 3/8/99. (am)
3/9/99	Pro se letter sent to attorney Deborah Lowenberg. (pr28)
3/19/99	Appellant Sherman Walker brief FILED with proof of service. (shelf 28) Cancel response to Anders brief (pr28)
3/19/99	Appellant Sherman Walker joint appendix filed w/pfs. Number of volumes: 10. (pr28)
4/14/99	Appellee Christopher Artuz motion to extend time to file Appellee's brief until the week of June 1 or later, FILED (w/pfs). [1379287-1] (pr28)
4/20/99	Order FILED GRANTING motion for extended time [1379287-1] by Appellee Christopher Artuz, endorsed on motion form dated 4/14/99. Extended appellee's brief due date is 5/17/99. Extended argument week as early as 6/28/99. (LG) (pr28)
4/20/99	Notice to all parties of Order dated 4/20/99. (pr28)

Relevant Docket Entries — Court of Appeals

5/3/99	Letter received from Deborah Wolikow Loewenberg, dated 4/30/98 re: Rule 46(e) letter (pr28)
5/17/99	Appellee Christopher Artuz brief filed with proof of service. (shelf 28) (pr28)
7/26/99	A PANEL/ Proposed for argument the week of 9/13/99. (ca90)
8/4/99	Set for argument on 9/15/99 A PANEL. [98-2572] (ca93)
8/18/99	Letter received from Mary Lynn Nicolas, Assistant Attorney General, dated 8/17/99 re: informing the court that his office has reassigned the undersigned counsel for appellee in the above-entitled action. (pr28)
9/15/99	Case heard before Walker, Leval, Pooler, C.JJ. (TAPE: #26) (unj)
12/27/99	Papers <Certified/Paid Appeals Court CJA Voucher> from received. (pr28)
3/27/00	Judgment of the district court is REVERSED & REMANDED by published signed opinion filed. (RSP) [98-2572] (pr28)
3/27/00	Judgment filed. [Entry Date: 3/28/00] (pr28)
3/27/00	Notice to all parties of Opinion dated 3/27/00. (pr28)

Relevant Docket Entries — Court of Appeals

3/31/00	State Court proceedings returned to Attorney General's Office, 120 Broadway. (pr25)
4/4/00	Note: The OPINION PRICE is $ 2.00 (rek)
4/13/00	Errata sheet re: filed. (Page-1996, Line-18, Insert-. . . other collateral review (Emphasis for editing purpose only) (pr28)
4/17/00	Judgment MANDATE ISSUED. (pr28)
4/17/00	Notice to parties of Mandate issued on 4/17/00. (pr28)
5/23/00	Letter received from Florence A. Lott, dated 3/19/00 re: request for cost of attorney fees. (pr28)
5/31/00	Pro se letter from appellant's mother Florence A. Lott sent to attorney. (pr28)
6/7/00	Letter received from Deborah Loewenberg, dated 6/7/00 to Mr. Lott informing him that she received a letter from his mother dated 5/19/00. (pr28)
6/21/00	Letter received from Clayton R. Higgins, Jr., Assistant Clerk, dated 6/16/00 re: informing the court the application for an extension of time within which to file a petition for a writ of certiorari in the case has been presented to Justice Ginsburg, who extended the time until July 25, 2000. (pr28)

Relevant Docket Entries — Court of Appeals

7/26/00	Notice of filing petition for writ of certiorari for Appellant Sherman Walker dated 7/24/00 filed. Supreme Ct#: 00-121. (pr28)
10/20/00	Letter received from Deborah Wolikow Loewenberg, dated 10/18/00 re: enclosed my supplemental voucher for the preparation of a brief in opposition to a petition for a writ of certiorari, filed with the United States Supreme Court on October 12, 2000. I enclosed a copy of my opposition brief. (pr28)
11/16/00	Letter dated 11/13/00 from the Supreme Court advising of order GRANTING petition for writ of certiorari [1670720-1] by Appellant Sherman Walker, endorsed on motion form dated 7/26/00. filed. (Supreme Court # 00-121) The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted. limited to Question 1 presented by the petition. (pr20)

* * * *

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

U.S. District Court
New York Eastern (Brooklyn)

CIVIL DOCKET FOR CASE #: 97-CV-3397

Walker v. Artuz

Filed: 06/10/97
Assigned to: Judge Sterling Johnson, Jr.
Demand: $0,000
Nature of Suit: 530
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

SHERMAN WALKER
petitioner

Sherman Walker
[COR LD NTC] [PRO SE]
92-A-7141
Greenhaven Correctional Facility
Draw B
Stormville, NY 12582-0445

v.

CHRISTOPHER ARTUZ, Superintendent
respondent

Relevant Docket Entries — District Court

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/10/97	1	PETITION for writ of habeas corpus; by Sherman Walker (ac) [Entry date 06/11/97]
6/10/97	—	Magistrate Chrein has been selected by random selection to handle any matters that may be referred in this case. (ac) [Entry date 06/11/97]
7/2/97	4	LETTER dated 6/30/97 from Sherman Walker to Judge Johnson, advising that the Court incorrectly filed his two petition's. (dg) [Entry date 08/05/97]
7/3/97	2	ORDER TO SHOW CAUSE: Petitioner is granted leave to proceed in forma pauperis; the Attorney General of the State of New York or, the District Attorney of Queens County, as attorney for respondents, show cause before this Court by the filing of a return to the petition, why a writ of habeas corpus should not be issued; within 20 days of receipt of this order, respondents shall serve a copy of their return on the petitioner herein and file the original thereof with proof of service with the Clerk of this Court; Petitioner, within 20 days of receipt by him or a copy of the return, shall file his reply, if any, with the clerk of this Court; and

		service of a copy of this OTSC shall be made by the clerk of this court by certified mail, together with a copy of the petition, to the Attorney General of the State of New York, and the District Attorney of Queens County, and by mailing a copy of this order to the petitioner. (signed by Judge Sterling Johnson Jr. on 6/30/97). c/m (dg) [Entry date 07/03/97]
7/3/97	3	CERTIFICATE OF SERVICE of OTSC and petition for writ of habeas corpus upon District Attorney of Queens County and NYS Attorney General Via Fedex on 7/3/97. (package tracking # 2293653364 and # 2293653375). (dg) [Entry date 07/03/97]
8/7/97	5	LETTER dated 7/22/97 from Efrem Z. Fischer to Judge Johnson, requesting an extension of time to respond to the petition from 7/27/97 to 8/26/97. (dg) [Entry date 08/07/97]
8/7/97	—	Endorsed order on doc. #5. Request granted until 8/26/97 to respond to the petition. (Signed by Judge Sterling Johnson Jr. on 7/23/97). (dg) [Entry date 08/07/97]
8/22/97	6	MOTION by Christopher Artuz to dismiss the writ of habeas corpus petition. Motion hearing <date not set> [6-1]. (tj) [Entry date 08/25/97]

Relevant Docket Entries — District Court

8/22/97	7	MEMORANDUM by Christopher Artuz in support of the [6-1] motion to dismiss the writ of habeas corpus petition. (tj) [Entry date 08/25/97]
10/14/97	8	REPLY AFFIDAVIT by Sherman Walker to motion to dismiss the writ of habeas corpus petition. (dg) [Entry date 10/14/97]
5/13/98	9	MEMORANDUM AND ORDER DISMISSING the [1-1] petition for a writ of habeas corpus. (signed by Judge Sterling Johnson Jr., dated 5/6/98) **Forwarded to Pro Se for a Judgment. (mrm) [Entry date 05/13/98]
5/18/98	10	JUDGMENT dated 5/15/98 that petitioner take nothing of respondent; that the petition for a writ of habeas corpus is dismissed as time barred; & that a certificate of appealability is denied. (Appeal package mailed). CM (lg) [Entry date 05/18/98]
5/18/98	—	Case closed. (lg) [Entry date 05/18/98]
6/19/98	11	NOTICE OF APPEAL by Sherman Walker Notice of Appeal and certified copy of docket sent appealing [10-1] judgment order, [9-1] order. IFP granted; Certificate of Appealability denied. Service made by clerk. (lizv) [Entry date 06/23/98]

Relevant Docket Entries — District Court

6/19/98	—	Notice of Appeal and certified copy of docket to USCA: [11-1] appeal (lizv) [Entry date 06/23/98]
6/23/98	—	Certified and transmitted record on appeal to U.S. Court of Appeals: [11-1] appeal. This record consists of doc# 1-11. PLEASE NOTE: NO STATE COURT RECORDS-PETITION TIME-BARRED. Acknowledgment requested. (lizv) [Entry date 06/23/98]
7/9/98	12	Acknowledgment from USCA received re: [11-1] appeal. Acknowledgment signed by R.R. on 6/24/98. (mm) [Entry date 07/09/98]
7/9/98	14	Letter dtd 7/1/98 from Marc Peta – USCA to Appeals Clerk re: request that the State Court Record be transferred by no later than 7/13/98. (mm) [Entry date 07/16/98]
7/16/98	13	Copy of Memo from Appeals Clerk to Marc Peta – USCA re: this is a time-barred case and therefore there is no State Court Record. (mm) [Entry date 07/16/98]
9/2/98	15	LETTER (with attachments) dated 8/25/98 from S. Walker to Judge Johnson requesting that the Court reconsider his habeas corpus petition. (tdh) [Entry date 09/08/98]

Relevant Docket Entries — District Court

9/2/98	16	MOTION (with exhibits) by Sherman Walker for reconsideration of [10-1] judgment order. No Motion hearing set. (tdh) [Entry date 09/08/98]
11/12/98	17	LETTER (undated) from S. Walker to Judge Johnson inquiring about the status of his motion for reconsideration. (tdh) [Entry date 11/30/98]
11/30/98	18	LETTER dated 11/27/98 from Ralph Vega, Jr. to Sherman Walker advising him that his motion for reconsideration is still pending and enclosing a copy of the docket sheet for this case. (tdh) [Entry date 11/30/98]
12/29/98	19	MANDATE OF USCA (certified copy) Re: [11-1] appeal. A motion having been made by petitioner-appellant pro se for a certificate of appealability, upon consideration, it is ordered that said motion be and is granted. The parties are ordered to brief the following issues: (1) whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 28 U.S.C. 2254 tolled the period of limitations set forth in 28 U.S.C. 2244(d)(2) and (2) whether the limitations period in Section 2244(d) may be equitably tolled where the prior, timely-filed Section 2254 petition did not file a new petition stating only exhausted claims until after the one-year grace period noted in Ross v.

		Artuz, 150 F.3d 97 (2d Cir. 1998). It is further ordered that counsel be appointed to represent the petitioner-appellant. Certified 12/18/98. Acknowledgment returned to USCA. Judge notified. USCA#98-2572. (mm) [Entry date 12/29/98]
2/17/99	20	LETTER dated 2/10/99 from S. Walker to Ralph Vega, Jr. inquiring about the status of his motion for reconsideration. (Pro Se sent docket sheet). (tdh) [Entry date 02/19/99]
3/5/99	21	LETTER dated 3/2/99 from S. Walker to Judge Johnson inquiring about the status of his motion for reconsideration. (tdh) [Entry date 03/25/99]
3/25/99	22	LETTER dated 3/24/99 from Ralph Vega, Jr. to Sherman Walker advising him that his motion for reconsideration is still pending. (tdh) [Entry date 03/25/99]
9/30/99	—	Endorsed order denying [16-1] motion for reconsideration of [10-1] judgment order (Signed by Judge Sterling Johnson Jr., on Sept. 27, 1998.) (tv) [Entry date 10/04/99]
10/14/99	23	LETTER (undated) from Judge Johnson's Chambers to Mr. Walker enclosing a copy of Judge Johnson's order that denied his motion for reconsideration of the Court's denial of his petition for a writ of habeas corpus. (tdh) [Entry date 10/20/99]

Relevant Docket Entries — District Court

4/24/00	24	MANDATE OF USCA (certified copy). On consideration whereof, it now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is reversed and the matter is remanded to said district court for further proceedings in accordance with the opinion of this court. Issued as Mandate: 4/17/00. Judge Notified. USCA# 98-2572. (lizv) [Entry date 04/26/00]
5/15/00	25	LETTER dated 5.10.00 from Sherman Walker to the Chief Court Clerk inquiring about the status of his petition. Pro Se Responded. (tdh) [Entry date 05/17/00] [Edit date 05/17/00]

[END OF DOCKET: 1:97cv3397]

ORDER OF THE SUPREME COURT OF THE UNITED STATES GRANTING CERTIORIARI DATED AND DECIDED NOVEMBER 13, 2000

SUPREME COURT OF THE UNITED STATES

00-121

GEORGE DUNCAN, SUPERINTENDENT,
GREAT MEADOW CORRECTIONAL FACILITY

v.

SHERMAN WALKER

* * *

PRIOR HISTORY: Reported below: 2000 U.S. App. LEXIS 5117.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The motion of respondent for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Question 1 presented by the petition.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of December one thousand nine hundred and ninety-eight,

Present:

Hon. James L. Oakes,
Hon. Dennis Jacobs,
Hon. Rosemary S. Pooler,
Circuit Judges.

98-2572

Sherman Walker,

Petitioner-Appellant,

v.

Christopher Artuz, Superintendent,

Respondent-Appellee.

A motion having been made herein by petitioner-appellant *pro se* for a certificate of appealability, upon consideration thereof, it is ordered that said motion be and it

hereby is granted. The parties are ordered to brief the following issues: (1) whether the petitioner-appellant's first petition for writ of habeas corpus pursuant to 29 U.S.C. § 2254 tolled the period of limitations set forth in 28 U.S.C. § 2244(d)(2), and (2) whether the limitations period in Section 2244(d) may be equitably tolled where the prior, timely-filed Section 2254 petition was dismissed without prejudice for failure to exhaust all claims and the petitioner-appellant did not file a new petition stating only exhausted claims until after the one-year grace period noted in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998). It is further ordered that counsel be appointed to represent the petitioner-appellant.

FOR THE COURT:
Carolyn Clark Campbell, Clerk

By: s/ Lucille Carr

DEC 18 1998

PETITION UNDER 28 U.S.C. § 2254 DATED MAY 20, 1997 WITH EXHIBIT C ATTACHED

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

UNITED STATES DISTRICT COURT

District	EASTERN
Name	SHERMAN WALKER
Prisoner No.	92A7141
Case No.	96 CV. 2946
Ind.	2/20#91
Place of Confinement	GREEN HAVEN CORRECTIONAL FACILITY

Name of Petitioner (include name under which convicted)
SHERMAN WALKER

v.

Name of Respondent (authorized person having custody of petitioner)
CHRISTOPHER ARTUS

The Attorney General of the State of:
New York, State Capitol, Albany, N.Y. 12224

Petition Dated May 20, 1997 with Exhibit C

PETITION

1. Name and location of court which entered the judgment of conviction under attack
   Supreme Court Crim. Term Part-K9 Queens Co., 125-01 Queens Boulevard, Kew Gardens

2. Date of judgment of conviction
   June 6, 1992

3. Length of sentence
   7 to 14 years

4. Nature of offense involved (all counts)
   Robbery in the First degree, one Count

5. What was your plea? (Check one)

* * *

(c) Nolo contendere ☑

* * *

8. Did you appeal from the judgment of conviction?
   Yes ☑ No ☐

9. If you did appeal, answer the following:

   (a) Name of Court
   APPELLATE DIVISION SECOND DEPART.

Petition Dated May 20, 1997 with Exhibit C

(b) Result
AFFIRMED

(c) Date of result and citation, if known
JUNE 12, 1995 / N/A

(d) Grounds raised
That the people failed to provide detective's affidavit for line up order prior to Wade hearing was reversible *Rosario*; The defendant was denied his Constitutional right to counsel at the lineup where the police had failed to contact defendant's retained counsel.

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court
New York State Court of Appeals

(2) Result
DENIED LEAVE TO APPEAL

(3) Date of result and citation, if known
January 15, 1996 / N/A

(4) Grounds raised
That the people failed to provide detective's affidavit for line up order prior to Wade hearing was reversible *Rosario*; The defendant was

Petition Dated May 20, 1997 with Exhibit C

denied his Constitutional right to counsel at the lineup where the police had deliberately failed to contact def. counsel as a matter of law.

* * *

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

* * *

A. Ground one:
Criminal Procedure Law Rosario Violation

Supporting FACTS (state *briefly* without citing cases or law)
That the people's failure to provide a copy of the detective's affidavit submitted in support to take-out order prior to wade hearing a reversible *Rosario* violation. Information in the line up order related to the subject matter of the officer direct testimony. Without this required document my defense at the hearing was hampered.

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B. Ground two:

Supporting FACTS (state *briefly* without citing cases or law):
I was denied my right to counsel at Wade hearing where people knew defendant had retained counsel and where defendant requested that his retained counsel be present while at the precinct during the line-up, and that the officers were full aware that a lawyer had represented defendant on an unrelated case which were an outstanding (warrant) placing the officer on notice. (See Ex(B) enclosed herein).

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☑

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing
None

(b) At arraignment and plea
None

* * *

(d) At sentencing
Steven Greenfield
12 Melbourne, Great Neck, N.Y.

Petition Dated May 20, 1997 with Exhibit C

(e) On appeal
Alden T. Lewis
657 Fulton St., B'klyn., N.Y. 11217

* * *

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☑

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future:
Supreme Court of New York County, 111 Centre Street, N.Y., N.Y. 10013.

(b) Give date and length of the above sentence:
Feb. 12th, 1992, 12½ to 25 yrs.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☑ No ☐

The information herein

Petition Dated May 20, 1997 with Exhibit C

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury
that the foregoing is true and correct.
Executed on May 20th, 1997.

s/ Walker, Sherman
Signature of Petitioner

* * *

Petition Dated May 20, 1997 with Exhibit C

EXHIBIT C

To be Argued by
Alden T. Lewis
(20 minutes)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Case No. 92-04929

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant.

Heard on the
Original Record
Ind. No. 2120/91

BRIEF FOR DEFENDANT-APPELLANT

Alden T. Lewis
Attorney for Appellant
657 Fulton Street
Brooklyn, New York 11217
(718) 243-1550

* * *

Petition Dated May 20, 1997 with Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Case No. 92-04929

Ind. No. 2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff-Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant.

Statement Pursuant to CPLR Section 5531

1. The indictment number in the court below was 2120/91.

2. The full names of the original parties were The People of the State of New York against Sherman Walker and Thomas Phillips. Thomas Phillips is not a party to this appeal.

3. This action was commenced in Supreme Court, Queens County in 1991 by the filing of an indictment.

4. This is an appeal from a judgment of the Supreme Court, Kings County, rendered June 6, 1992 convicting defendant, after a guilty plea of Robbery in the First Degree.

Petition Dated May 20, 1997 with Exhibit C

5. Appellant seeks a reversal of the conviction and a new trial, or, in the alternative, a reduced sentence.

6. This appeal is not being prosecuted by the appendix method.

Preliminary Statement

This is an appeal from a judgment of the Supreme Court, Queens County, rendered June 6, 1992 convicting defendant after a plea of guilty to Robbery in the First Degree (Penal Law Section 160.15) and sentencing him to a minimum term of seven years and a maximum term of fourteen years as a second felony offender, to run concurrently with a recently imposed sentence.

Notice of Appeal was timely filed. This Court granted Appellant leave to appeal as a poor person and appointed Alden T. Lewis as appellate counsel by order dated May 17, 1993. No application for a stay of the sentence was made and defendant is currently incarcerated.

Questions Presented

1. Was the People's failure to provide a copy of the detective's affidavit submitted in support of take-out order prior to Wade hearing a reversible *Rosario* violation?

2. Was defendant denied his right to counsel at Wade hearing where People knew defendant had retained counsel and where defendant requested that his retained counsel be present?

Petition Dated May 20, 1997 with Exhibit C

3. Did the defendant's appearance make the lineup impermissibly suggestive?

4. Should the defendant be resentenced where he received the maximum sentence as a result of going to trial on other cases and where the Court had just sentenced him on another case?

Statement of Facts

Background

Based on information from a confidential informant a detective obtained a photograph of the defendant and showed it to a robbery victim. The detective applied for a take-out order and a lineup was held wherein defendant was viewed by the victims of several jewelry store robberies. Shortly thereafter the defendant was arrested for the robbery of the Venice Jewelry store which occurred on September 19, 1990.

Wade Hearing

DETECTIVE JAMES REDMOND (Redmond) was called by the People. He has been a detective since 1980. The investigation of the September 19, 1990 robbery of Venice Jewelers began in January 1991 when the detective's supervisor instructed him to get in touch with a Detective Russo and a Detective Favilla, both of whom gave him the names of five individuals who were possible suspects, including the defendant. After obtaining photographs of the suspects he took them to complaining witness Nasim Farajian on January 25, 1991.

The detective went to Venice Jewelers and showed Farajian a stack of sixteen photographs. The photographs were marked and the detective had kept them in his case folder until time of trial. The case folders are kept in a file cabinet, which is accessible by others in the office. The photographs were admitted without objection.

Detective Redmond said that Farajian identified photographs of defendant and of Thomas Phillips. Farajian said that "Phillips . . . was the taller subject that had the gun and Mr. Walker, he said . . . this is the fellow that had the glasses on during the robbery" (W. 10-11)*

The detective was informed on March 22, 1991 that a take-out order had been approved. On 27th the detective removed defendant and Mr. Phillips from the Brooklyn jail and took them to the 109th Precinct for lineup. The two defendants were placed in the same room on opposite sides, with each side also containing five "fillers". Lineup viewers were only able to see one side of the room at a time; to see individuals on the other side the viewer had to go into another room (W. 16). Farajian first viewed the lineup with Sherman Walker. He identified him then went to the second room where he identified Thomas Phillips.

Photographs of the lineup were marked as px 1A and 1B. The detective said that the photographs were taken at a different angle than would be seen by a lineup viewer, but that otherwise the photographs were fair and accurate

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* Transcript pages preceded by a "W" refer to pages of the Wade hearing held December 31, 1991 [cover indicates 12/6/91]

representations of the lineup (W. 22). Px 3A through 3D were additional photographs of the same lineup.

On VOIR DIRE the witness said that he photographs were the same as those introduced at a Wade hearing with regard to Ind. No. 2119/91. The photographs were taken before the lineup but the detective doesn't know who took them. A picture was not taken each time a witness looked at suspects (W. 27-33).

Mr. Walker was involved in more than five lineups on March 27th. The Court did not allow any questions about any of the other lineups (W. 34). The lineup viewed by Farajian was the last one the defendant appeared in. The lineup photographs were admitted over objection.

Continued Wade Hearing

The hearing was continued on February 4, 1992**. Mr. Schwartz, counsel for co-defendant Phillips commenced cross examination. Detective Redmond recalled that Mr. Schwartz appeared at the lineup and that Mr. Schwartz told the detective that Sherman Walker wanted an attorney who had been assigned to him in Manhattan. The lineup consisted of the two defendants and ten fillers. All the participants maintained the same position for each successive viewing.

All together Detective Redmond was investigating seven jewelry store robberies. He didn't find out whether any of

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** Transcript pages preceded by a "WW" refer to pages of the Wade hearing held on February 4, 1992

the victims were known to each other. With regard to the September 19, 1990, Farajian was the only person he interviewed. As a result of the overall investigation several people viewed the same lineup on March 27th. The detective doesn't know if they spoke with each other.

The complaint follow-up report (DD5) prepared by the detective had been redacted. In chambers the People said "This is a confidential informant who did supply information to the Detective Redmond with regard to this investigation" (WW. 14). According to the People information from the other police led to the informant who confirmed the information that Detective Redmond had already received. The prosecutor argued that the informant's reliability was not an issue for the Wade hearing (WW. 15) . Defense counsel argued that probable cause is always at issue in a Wade hearing. The Court said that the name did not have to be provided after the People said that the confidential informant would not be called as a witness.

Detective Redmond said the confidential informant's name was provided by both detective he spoke with in January 1991. The Court sustained objections to "Where did you meet him?" and to "Did he have any pending cases?". The detective's notes of his interview of the confidential informant were on the same page of his notes of the conversation with Russo and Favilla. The People agreed to provide the notes with information about the confidential informant redacted. Defense counsel said that the notes should have been provided prior to the hearing. The People replied that they did not know about the notes.

Petition Dated May 20, 1997 with Exhibit C

The detective said that he showed the photographs in evidence to confidential informant. The confidential informant identified the defendant as the leader of a robbery ring. The detective said that he covered the photographs with plastic to simulate eyeglasses on the subject (WW. 34). The detective doesn't know if the confidential informant was paid or if he had previously provided information to the police. The confidential informant recognized most of the individuals in the photographs. He said that they were probably the ones involved in the robberies that the detective was investigating. Objection sustained to questions regarding whether the confidential informant witnessed the robbery.

The detective went to Farajian's store on on January 25, 99 at about 12:30 p.m. Farajian told him that a group of six individuals came into his store. The one with the gun was tall and the rest were of medium height. The witness did not furnish any additional descriptions. Farajian went through the stack of photographs. The detective again covered the photographs with plastic to simulate the wearing of glasses. Farajian said that Sherman Walker was the person who wore glasses during the robbery. After Farajian viewed the lineup Detective Redmond asked if he would be willing to view a lineup.

Detective Redmond said that he did not know that Mr. Walker had a pending case even though his notes referred to Mr. Walker's January 9, 1990 arrest and contained Mr. Walker's NYSID number. The detective said he didn't "run" the NYSID number. He explained that when Mr. Schwartz came in he only said that the defendant had an attorney in Manhattan, he didn't mention a Queens case. He didn't find

about the Queens case until he spoke with the A.D.A. on this case.

Wade Hearing February 11, 1992

The detective said that he applied for a take-out order but did not appear in court on March 22nd, the day that the order was signed (WWW. 5)***. The detective found out on the day of the lineup that Mr. Schwartz would represent both defendants. He said that he tried to call the attorney requested by the defendant but there was no answer.

Detective Redmond told the lineup witnesses to arrive between seven and nine o'clock and to wait downstairs when they arrived at the precinct (WWW. 9) Shortly after seven o'clock the detective went downstairs and explained the lineup procedure to the witnesses who had arrived. The witnesses were spread throughout the room; he brought them together to give them instruction (WWW. 15). The witnesses He then went back upstairs to help setup the lineup. Farajian didn't arrive until eight o'clock (WWW. 12, 13)

The first witness viewed the codefendant. The detective believes that the witness was escorted downstairs afterwards (WWW. 17). Mr. Walker was identified by other witnesses on other cases. Prior to viewing the lineup the witnesses were all brought upstairs and told to wait in the hallway outside the viewing area (WWW. 22). After viewing the lineup the witnesses didn't go back into the same hallway, they exited

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*** Transcript pages preceded "WWW" refer to pages of the Wade hearing held on February 11, 1992 in the morning

via different route. The detective doesn't recall if Schwartz went in to speak with the defendant after any of the separate viewings (WWW. 26).

Photographs of a lineup involving a different case were commingled with the photographs from this case. The Court did not allow defense counsel to inquire whether any of the witnesses from the different case viewed both lineups.

The Court said that it would give the defense some latitude on cross examination because of the other indictments. Counsel said that he didn't want to waive the right to any future hearings. The Court responded that the hearing would then be confined to the facts of Ind. No. 2120/91.

Farajian was the only person to view the lineup in the instant case (F4. 8, 15)****. The other witnesses had departed by the time Farajian arrived at 7:45 p.m. (F4. 19). Detective Redmond met him on he steps and escorted him upstairs. The detective said that he didn't select the fillers although he did fill out the lineup form (W4. 12). The court said that the lineup photographs speak for themselves when it sustained objections to questions about the physical appearance of the lineup participants.

Mr. Schwartz argued that there was no evidence that information from the confidential informant was reliable. He also said that the lineups were tainted by the gathering of the complaining witnesses on various cases where it was

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**** Transcript pages preceded by "F4" refer to pages of the Wade hearing held on February 11, 1992 in the afternoon

likely that they were known to each other. He added that two of the witnesses were father and son. The son viewed the lineup and then waited for his father who came late. As a result there was no separation of witnesses.

Mr. Greenfield argued that there was a conflict of interest where only one attorney represented both defendants at the lineup. The police in this case made insufficient efforts to contact the defendant's retained attorney. Counsel further argued that no evidence was produced to show that the confidential informant was reliable and that Farajian's photographic identification was tainted because Detective Redmond altered the photographs. Additionally the photographs showed that Sherman Walker stood out from the fillers (W4. 29-32).

The People responded that probable cause arose from the photographic identification and from he lineup, not from the confidential informant. "Drawing glasses" on the photographs not suggestive because it was done to all the photographs shown to the witness. Detective Redmond offered to let defendant chose his lineup position but he refused to do so. There was no taint regarding Farajian's identification because all the witnesses had left by the time he arrived at the precinct. The prosecutor also argued that the photographs of the lineup showed no suggestiveness due to defendant's appearance.

The Court denied the motion, saying that the role of the confidential informant was minimal.

Petition Dated May 20, 1997 with Exhibit C

Plea

The defendant entered an *Alford* plea to the charge of robbery in the first degree.

Sentence

The Court denied defendant's application to withdraw his plea. The basis of the application was that one of the prosecution witnesses whom the defendant believed was unavailable was now known to be available. The defendant was sentenced to a minimum of seven years and a maximum of fourteen years imprisonment, to run concurrently with the same sentence imposed on Ind. No. 6542/89.

ARGUMENT

POINT I THE PEOPLE'S FAILURE TO PROVIDE DETECTIVE'S AFFIDAVIT SUBMITTED IN SUPPORT OF TAKE-OUT ORDER PRIOR TO WADE HEARING WAS REVERSIBLE ROSARIO VIOLATION

Prior to the Wade hearing defense counsel requested a copy of the affidavit submitted by Detective Redmond in support of the order directing defendant to appear in a lineup. Prior to the start of trial counsel requested to reopen the Wade hearing based on information in the newly discovered affidavit. Although counsel obtained the affidavit, it was not until after the Wade hearing. Additionally, the court denied the defense motion to reopen the Wade hearing.

A prior statement by a witness who testifies at trial is clearly Rosario material. The detective's affidavit referred

to a confidential informant whose information helped launch this investigation. The trial court attempted to minimize the role of the informant but it is well-settled that defense counsel, not the prosecutor or the court "is in a far better position to appraise the value of a witness' pretrial statements for impeachment purposes" *People v. Rosario*, 9 N.Y.2d 286, 290, 213 N.Y.S.2d 448, 173 N.E.2d 881, cert. denied, 363 U.S. 866, 82 S.Ct. 117, 17 L.Ed.2d 64.

This evidence was critical because the alleged informant was known to the defendant. It is therefore likely that this information would have significantly affected the outcome of the trial. *People v. Jones*, 70 N.Y.2d 547, 550, 523 N.Y.S.2d 53, 517 N.E.2d 865 (1987) ("evidence must be material to the defense and would have in any reasonable likelihood, affected the judgment").

The People's failure to produce the requested Rosario material together with the trial court's failure to reopen the Wade hearing, amounted to a complete failure" to turn over the requested material. *People v. Ranghelle*, 69 N.Y.2d 56, 63, 511 N.Y.S.2d 580, 503 N.E.2d 1011 (1986). As a result there was per se error which requires reversal of the conviction and the ordering of a new trial.

POINT II DEFENDANT WAS DENIED HIS RIGHT TO COUNSEL AT THE LINEUP WHERE THE POLICE FAILED TO CONTACT DEFENDANT'S RETAINED COUNSEL

Defendant acknowledges that the right to counsel does not attach until the formal initiation of a prosecution.

People v. Hawkins, 55 N.Y.2d 474, 483, 450 N.Y.S.2d 159, 435 N.E.2d 376 (1982). In this case, however, defendant had retained counsel on Ind. No. 6542/89. Defendant's retained counsel could not be excluded from the lineup in this case unless his arrival caused unreasonable delay. *Hawkins*, 55 N.Y.2d at 486, 450 N.Y.S.2d at 166, 435 N.E.2d at __. "Pertinent to this consideration is whether the delay would result in significant inconvenience to the witnesses or would undermine the substantial advantage of a prompt identification confrontation" *Ibid.*

The take-out order in this case was signed March 22, 1991. The lineup was not held until five days later. Thus there was no question of a prompt investigation or witnesses' convenience. The police knew or should have known that defendant had an attorney because he was incarcerated. The Assistant District Attorney who submitted the order should have known the defendant had an attorney because he had an open case in Queens Supreme Court. Moreover, it is undisputed that the defendant unequivocally requested the presence of his retained counsel.

"Though law enforcement authorities ordinarily are not required to notify counsel of an impending investigatory lineup absent a specific request to do so, when the police are aware that a criminal defendant is represented by counsel and the defendant explicitly requests this assistance of his attorney, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording him or her an opportunity to appear" *People v. Coates*, 74 N.Y.2d 244, 249, 544 N.Y.S.2d 992, 994, __ N.E.2d __ (1989).

Petition Dated May 20, 1997 with Exhibit C

The single last-minute telephone call made by the detective is insufficient evidence of an acceptable effort to contact the attorney under the circumstances of this case. Moreover, the police knew that defendant was going to be viewed by several robbery victims. As a result the failure to promptly notify defendant' counsel is even more egregious.

POINT III THE DEFENDANT'S APPEARANCE MADE THE LINEUP SUGGESTIVE

The defendant concedes that lineup fillers are not required to match his appearance exactly. *People v. Rodriguez*, 124 A.D.2d 611, 507 N.Y.S.2d 757 (2d Dep't 1986). Yet "[t]he issues involved in ascertaining the validity of a lineup identification concerns "undue suggestiveness" which is determined by considering the totality of he circumstances surrounding the lineup" (*Ibid.*).

In this case the defendant's complexion and his clothing made him stand out from the fillers. These features were aggravated by the lighting conditions in the viewing area. Additionally defendant likely stood out more because of the police practice of getting fillers from men's shelters. The trial court simply made a factual error when it determined that the lineup photographs showed that the fillers were sufficiently similar to the defendant.

Petition Dated May 20, 1997 with Exhibit C

IV THE DEFENDANT SHOULD BE RESENTENCED

A. *The Defendant Received an Excessive Sentence*

A defendant may not be punished for asserting his right to trial. At the same time the mere fact that a defendant received enhanced punishment after trial is not proof of vindictiveness. *People v. Patterson*, 106 A.D.2d 520, 483 N.Y.S.2d 55 (2d Dep't 1984). In this case it appears that a plea bargain was offered wherein in exchange for his guilty plea on this case and others before the Court the defendant would receive "little" additional prison time.

The codefendant was allowed to plead guilty to Attempted Robbery in the Second Degree. He was sentenced to three to six years. According to the eyewitness the codefendant was the one with the gun. There was no injury in this case and the defendant maintained his innocence throughout. It appears that the court only considered the defendant' prior record when it imposed sentence.

B. *The Defendant Should Be Resentenced in front of Different Judge*

The defendant was entitled to be sentenced in front of a different judge where the judge had recently sentenced him on two unrelated case. Clearly there was an abuse of discretion where the defendant with the weapon is sentenced to less than half the sentence of the defendant.

Petition Dated May 20, 1997 with Exhibit C

For these reasons defendant's sentence should be reduced in the discretion of this Court. Alternative, this Court should remand this matter for resentencing.

CONCLUSION

Defendant's conviction should be reversed and a new trial ordered, alternatively the defendant's sentence should be reduced.

Respectfully submitted,

Alden T. Lewis
657 Fulton Street
Brooklyn, New York 11217
(718) 243-1550

to: Honorable Charles Hynes
District Attorney, Kings County
210 Joralemon Street
Brooklyn, New York 11201

Clerk of the Court
Appellate Division of
The Supreme Court
45 Monroe Place
Brooklyn, New York

RESPONDENT'S NOTICE OF MOTION TO DISMISS DATED AUGUST 22, 1997 WITH EXHIBITS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 Civ. 3397 (SJ) (ASC)

Pro Se

SHERMAN WALKER,

Petitioner,

– against –

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

NOTICE OF MOTION

PLEASE TAKE NOTICE, that, upon the memorandum of law transmitted herewith, the respondent will move this Court, before the Honorable Sterling Johnson, Jr., United States District Judge, at United States Court House, Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on September 25, 1997, for an order pursuant to the new Antiterrorism and Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), dismissing the petitioner's application for a writ of habeas corpus for failure to comply with the one-year statute of limitation and for any further relief as this Court deems just and proper.

Respondent's Notice of Motion to Dismiss

Dated: August 22, 1997
New York, New York

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
120 Broadway
New York, New York 10271

Respondent's Notice of Motion to Dismiss

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 Civ. 3299 (SJ) (ASC)

Pro Se

SHERMAN WALKER,

Petitioner,

– against –

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

AFFIRMATION IN SUPPORT

EFREM Z. FISCHER, an attorney at law, duly admitted to practice before this court, affirms under the penalties of perjury that the following facts are true:

1. That I am an Assistant Attorney General to Dennis C. Vacco, Attorney General of the State of New York, attorney for the respondent herein and submit this Affirmation in Support of respondent's Motion to Dismiss this habeas corpus petition.

2. Petitioner filed this application for a writ of, habeas corpus on June 10, 1997. *See* Petition, Page 2, dated May 20, 1997.

Respondent's Notice of Motion to Dismiss

3. Said application for a writ of habeas corpus is untimely and should be dismissed pursuant to the Anti-terrorism and Death Penalty Act of 1996 ("AEDPA") since petitioner has filed his petition beyond the one year statute of limitation period and the law is clear that such a filing is untimely and should be dismissed.

4. That annexed hereto as Exhibit A is a copy of the decision of the New York Court of Appeals denying leave to appeal, *i.e.*, petitioner's last state court action.

5. Annexed hereto as Exhibit B is a courtesy copy of *Oppenheimer v. Kelley*, 1997 WL 362216 (S.D.N.Y. Chin, J, June 27, 1997).

6. Annexed hereto as Exhibit C is a courtesy copy of *Lee v. Artuz*, 1997 WL 405329 (S.D.N.Y. Stein, J, June 24, 1997).

7. Annexed hereto as Exhibit D is a courtesy copy of *Kirby v. Senkowski*, 1997 WL 399663 (S.D.N.Y. Chin, J, July 15, 1997).

8. That petitioner has failed to act for over a year past the date of his last state court action before asserting his alleged federal claim and waited over one year after the effective date of the AEDPA before filing the petition.

9. That based upon the Exhibits annexed hereto and the Memorandum of Law submitted herewith, this petition for a writ of habeas corpus must be dismissed as a matter of law because it is untimely.

Respondent's Notice of Motion to Dismiss

WHEREFORE, the respondent preys that this court dismiss the petitioner's application for a writ of habeas corpus and that if said relief is denied, respondent respectfully requests additional time to respond on the merits.

Dated: August 22, 1997
New York, New York

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for respondent
By:

s/ Efrem Z. Fischer
EFREM Z. FISCHER (EZF-3860)
120 Broadway
New York, New York 10271
(212) 416-8591

Efrem Z. Fischer
Assistant Attorney General
Of Counsel

Respondent's Notice of Motion to Dismiss

EXHIBIT A

State of New York
Court of Appeals

Court of Appeals Hall
Albany, New York 12207

George Bundy Smith
Judge

January 5, 1996

Mr. Sherman Walker
#895950275631A9
14-14 Hazen Street
East Elmhurst, NY 11370

Re: *People v. Sherman Walker*
Indictment Nos. 2120/91 and 6542/89
Supreme Court, Queens County

Dear Mr. Walker:

Enclosed you will find copies of four orders signed today dismissing your applications for permission to appeal to the Court of Appeals in the above-referenced cases.

Very truly yours,

s/ George Bundy Smith
George Bundy Smith

GBS:ba

cc: Hon. Richard A. Brown
District Attorney, Queens County

Clerk's Office
Court of Appeals

Respondent's Notice of Motion to Dismiss

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

Ind. No. 6542/89
2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to Section 460.20 of the Criminal Procedure Law is dismissed because application for the same relief has already been made to and denied by order of the Appellate Division dated October 3, 1995 (CPL Section 460.20; *People* v. *McCarthy*, 250 NY 358, 361).*

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* Description of Order: Order of the Appellate Division, Second Department, dated June 12, 1995, affirming a judgment of Supreme Court, Queens County, rendered February 27, 1992.

Respondent's Notice of Motion to Dismiss

Dated: Albany, New York
January 5, 1996

s/ George Bundy Smith
Associate Judge

Respondent's Notice of Motion to Dismiss

EXHIBIT B

UNITED STATES DISTRICT COURT
S.D. NEW YORK.

No. 97 CIV. 3035(DC).

RAFAEL OPPENHEIMER

v.

WALTER R. KELLY,

Respondent.

June 27, 1997.

MEMORANDUM DECISION

CHIN, District Judge.

Rafael Oppenheimer has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to have this Court set aside his November 19, 1986 conviction for Attempted First Degree Murder and Second Degree Criminal Possession of a Weapon. For the following reasons I find that the petition is barred by the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1), and, thus, the petition is hereby dismissed.[1]

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1. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

DISCUSSION

Section 101 of the Antiterrorism and Effective Death Penalty Act (the "AEDPA")[2] amended 28 U.S.C. § 2244 to require a one-year period of limitation for the filing of a petition for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by the state courts. 28 U.S.C. § 2244(d)(1)(A). The one-year limitation period in § 2244(d)(1), however, does not apply to habeas petitions filed before the enactment of the AEDPA. Reyes v. Keane, 90 F.3d 676, 679 (2d Cir.1996). Nevertheless, "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," he need not be accorded a full year after the effective date of the AEDPA to file a habeas corpus petition in federal court. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir.1997). Rather, the prisoner need only be given a "reasonable" period of time after the effective date of the AEDPA to file his petition. Id. (holding that a petition filed 72 days after the effective date of the AEDPA was filed within a reasonable period of time).

In the present case, state court direct review of petitioner's conviction ended on December 20, 1989. Thus, petitioner took more than seven years to "contemplate" bringing his petition for habeas corpus review. Moreover, petitioner did not file this petition until April 9, 1997 — 350 days after the effective date of the AEDPA. I find that filing

2. The AEDPA, Pub.L. No. 104-132, 1996 U.S.Code Cong. & Ad. News (110 Star) 1214, was signed by the President, and became effective, on April 24, 1996.

the petition 350 days after the AEDPA took effect did not constitute filing within a "reasonable" period of time. To hold otherwise would have the effect of ignoring the holding of Peterson v. Demskie. Certainly, in determining that there is "no need to accord a full year after the effective date of the AEDPA" for the filing of a petition, the Second Circuit could not have meant to suggest that 350 days — just fifteen days shy of a full year — is required.

CONCLUSION

For the foregoing reasons, the petition is dismissed.

SO ORDERED.

Respondent's Notice of Motion to Dismiss

EXHIBIT C

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 97 Civ. 3190 (SHS)(AJP).

DAVID LEE,

Petitioner,

v.

CHRISTOPHER ARTUZ, Superintendent of Green Haven Correctional Facility,

Respondent.

June 24, 1997.

STEIN

In a "Report and Recommendation" dated May 21, 1997, U.S. Magistrate Judge Andrew J. Peck recommended that:

Petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed on the grounds that his petition is untimely pursuant to the one year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

Written objections to the "Report and Recommendation" have not been filed with the Court by petitioner and the time

in which to file such objections has expired pursuant to 28 U.S.C. § 636(b)(1) and Fed.R.Civ.P. 72(b).

Upon review de novo of Magistrate Judge Peck's "Report and Recommendation" dated May 21, 1997,

IT IS HEREBY ORDERED that:

1. Petitioner's application for a writ of habeas corpus is dismissed on the grounds that his petition is untimely pursuant to the one year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").

2. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. 28 U.S.C. § 2253, as amended by the AEDPA; see also Rodriquez v. Scully, 905 F.2d 24 (2d Cir.1990) (per curiam) (discussing issuance of a certificate of probable cause under standard prior to amendment of 28 U.S.C. § 2253); Alexander v. Harris, 595 F.2d 87, 90-91 (2d Cir.1979).

3. Pursuant to 28 U.S.C. § 1915(a) the Court certifies that any appeal from this Order would not be taken in good faith.

Respondent's Notice of Motion to Dismiss

REPORT AND RECOMMENDATION

ANDREW J. PECK, United States Magistrate Judge:

To the Honorable Sidney H. Stein, United States District Judge:

Pursuant to Rule 4 of the Rules Governing Section 2254 cases in the United States District Courts, 28 U.S.C. foll. § 2254, I recommend that the Court summarily dismiss petitioner David Lee's habeas corpus petition on the ground that he is not entitled to relief, since his April 18, 1997 petition is untimely under the one-year limitation period imposed by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[1]

FACTS

Petitioner David Lee's habeas petition is dated April 18, 1997 and was received by the Court's Pro Se Office on April 24, 1997. (See Petition.) The Petition indicates that on December 15, 1983, Lee was convicted of second degree murder and first degree rape and sentenced to 25 years to life imprisonment. (Petition §§ 1-4.) The Appellate Division, First Department affirmed his conviction on May 19, 1988. People v. Lee, 140 A.D.2d 1011, 529 N.Y.S.2d 928 (1st Dep't 1988). (See Petition § 9.) The Court of Appeals denied leave to appeal on August 19, 1988. People v. Lee, 72 N.Y.2d 920, 532 N.Y.S.2d 854, 529 N.E.2d 184 (1988). (See Petition § 9.)

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1. Because of this Report and Recommendation to dismiss, the Court need not decide Lee's application for appointment of counsel.

As previously noted, Lee's federal habeas petition is dated April 18, 1997 and was received by the Court's Pro Se Office on April 24, 1997. It raises the same issue he previously raised on direct appeal — that his conviction was obtained by the testimony of an accomplice without corroborative evidence. (See Petition § 9(d), § 12.)

ANALYSIS

THE AEDPA'S ONE-YEAR STATUTE OF LIMITATIONS

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act. The AEDPA significantly modified § 2254 for non-death penalty cases. Specifically, the AEDPA instituted a one-year statute of limitations for habeas petitions:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.

28 U.S.C. § 2244(d)(1) (as amended by the AEDPA).

In Peterson v. Demskie, 107 F.3d 92 (2d Cir.1997), the Second Circuit held that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA." 107 F.3d at 93. Rather, the Court gave the prisoner a "reasonable time" after enactment of the AEDPA to bring his habeas petition. Id. (finding

petition brought 72 days after enactment of AEDPA to be timely).

Here, counting from the Court of Appeal's denial of leave to appeal, the one-year limitation period would have run no later than August 1989. Thus, Lee must be allowed a "reasonable time" after the April 24, 1996 enactment of the AEDPA to bring his federal habeas petition. Lee did not file his petition, however, until April 18, 1997 (giving him the benefit of the doubt) — just 6 days short of a year after enactment of the AEDPA. The Court need not decide where between 72 days (upheld in Peterson) and one year the line should be drawn. But if the Second Circuit's Peterson v. Demskie decision is to have any meaning, Lee's Petition, filed just 6 days short of a year and based on the same ground he previously raised in his 1988 direct appeal, is untimely. Under the AEDPA, therefore, Lee's Petition should be dismissed with prejudice.

CONCLUSION

For the reasons set forth above, the Court should dismiss with prejudice Lee's petition as barred by the AEDPA's one-year statute of limitations.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6. Such objections (and

any responses to objections) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Sidney H. Stein, 500 Pearl Street, Room 1010, and to the chambers of the undersigned, 500 Pearl Street, Room 1370. Any requests for an extension of time for filing objections must be directed to Judge Stein. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir.1993), cert. denied, 513 U.S. 822, 115 S.Ct. 86, 130 L.Ed.2d 38 (1994); Roldan v. Racette, 984 F.2d 85, 89 (2d Cir.1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir.), cert. denied, 506 U.S. 1038, 113 S.Ct. 825, 121 L.Ed.2d 696 (1992); Small v. Secretary of Health & Human Servs., 892 F.2d 15, 16 (2d Cir.1989); Wesolek v. Canadair Ltd., 838 F.2d 55, 57- 59 (2d Cir.1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir.1983); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72, 6(a), 6(e).

EXHIBIT D

UNITED STATES DISTRICT COURT,
S.D. NEW YORK.

No. 97 CIV. 3329 (DC).

TIMOTHY KIRBY,

Petitioner

v.

WARDEN DANIEL A. SENKOWSKI,

Respondent.

July 15, 1997.

CHIN, District Judge.

Timothy Kirby has petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner seeks to have this Court set aside his February 17, 1986 conviction for Murder in the Second Degree. For the following reasons I find that the petition is barred by the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1), and, thus, the petition is hereby dismissed.[1]

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1. Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts allows a court to order summary dismissal of a habeas corpus petition if the petitioner is not entitled to relief in the district court.

DISCUSSION

Section 101 of the Antiterrorism and Effective Death Penalty Act ("AEDPA")[2] amended 28 U.S.C. § 2244, to require a one year period of limitation for the filing of a petition for a writ of habeas corpus by a person if custody pursuant to the judgment of a state court. The limitation period, with certain exceptions, begins to run after the completion of direct review of the judgment by the state courts. 28 U.S.C. § 2244(d)(1)(A). The one year limitation period in § 2244(d)(1), however, does not apply to habeas petitions filed before the enactment of the AEDPA. Reyes v. Keane, 90 F.3d 676 679 (2d Cir.1996). Nevertheless, "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition," he need not be accorded a full year after the effective date of the AEDPA to file a habeas corpus petition in federal court. Peterson v. Demskie, 107 F.3d 92, 93 (2d Cir.1997). Rather, the prisoner need only be given a "reasonable" period of time after the effective date of the AEDPA to file his petition. Id. (holding that a petition filed 72 days after the effective date of the AEDPA was filed within a reasonable period of time).

In the present case, state court direct review of petitioner's conviction ended on September 6, 1988. Thus, petitioner took almost nine years to "contemplate" bringing his petition for habeas corpus review. Moreover, petitioner did not file this petition until April 15, 1997 — 356 days

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2. The AEDPA, Pub.L. No. 104-132 1996 U.S.Code Cong. & Ad. News (110 Stat) 1214, was signed by the President, and became effective, on April 24, 1996.

after the effective date of the AEDPA. I find that filing the petition 356 days after the AEDPA took effect did not constitute filing within a "reasonable" period of time. To hold otherwise would have the effect of ignoring the holding of Peterson v. Demskie. Certainly, in determining that there is "no need to accord a full year after the effective date of the AEDPA" for the filing of a petition, the Second Circuit could not have meant to suggest that 356 days — just nine days shy of a full year — is required.

CONCLUSION

For the foregoing reasons the petition is dismissed.

SO ORDERED.

PETITIONER'S REPLY AFFIDAVIT DATED SEPTEMBER 17, 1997 WITH EXHIBITS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97 Civ. 3397 (SJ)
97 Civ. 3398 (SJ)

Pro Se

SHERMAN WALKER,

Petitioner,

– against –

Artuz, Superintendent
Green Haven Corr. Fac.,

Respondent.

Reply Affidavit

I, Sherman Walker, duly state that I affirm under the penalties of perjury that the following facts are true:

(1). That I am a pro se litigant involved in the above matter before Your Honor Court, and I submit this affidavit in support of my initial application to proceed on a habeas corpus petition in all due respect to the Court.

(2). Respondents in this matter claim my petition for a writ of Habeas Corpus is untimely filed and should be

dismissed pursuant to the Anti-terrorism and Death Penalty Act of 1996 ("A.E.D.P.A."). Since my second application was filed with the Clerk of the Court on June, 1997, respondent claim a year beyond the one year statute of limitation period that the instant application should be dismissed. I most definitely disagree that my application should not be dismissed as untimeliness.

(3). That petitioner shall directly address the respondent's remark listed in their Memorandum of Law pages (1) through (6) therein urging Your Honor to deny me the much needed right to proceed on my Federal Habeas Corpus pursuant to 28 U.S.C. Sec. 2254(b) alleging an outright unfair trial and an unlawful conviction.

(4). Petitioner's application for leave to appeal to the New York State Court of Appeals was denied on Jan., 1996. *People* v. *Walker*, 87 N.Y.2d 926 (1996). Petitioner duly argue that his case position is well within the new statute of limitations. Petitioner register (3) objections to the respondent legal argument.

(5). First, my initial filing of my application were submitted with the Clerk of this Court on June 18th, 1996. [See, Ex. (A) appended proof of court receipt of my petition with exhibits]. The application was docket under 96 CV 2946 by pro se staff attorney Aliza Silber during that time. Your Honor had denied the by order dated July 16, 1996, [see, Ex. (1) appended at page (4) til (5) of Court Order]. Moreover, Your Honor had rendered that I had presented a lack of clearly stated exhausted State Court Claims specifying the claims litigated on my state appeal.

Petitioner's Reply Affidavit with Exhibits

[See, Ex. (B) supra Court order at page (4) til (5)]. Accordingly, my petition was dismissed without prejudice. Petitioner, therefore, stresses that this period of time computation toward the one year limitation stops from the date of his initial filing with this Court on June 18th, 1996, or based on Your Honor ruling of July 16, 1996, I respectfully submit that for this Court not to allow me to proceeding from the initial juncture of June 18, documented with this Court or from July 16, the dismissal juncture. Such a dismissal would diminish a substantive right or a prudent available remedy on having my State issues heard which the respondent attempts to water down with an incorrect argument grabbing for straws and rushing for judgment. I should be given the benefit of doubt. I agree the one year started running on Jan. 5, 1996, from the NEW YORK COURT OF APPEAL denied me leave to appeal. However, I properly filed my petition on June 18, 1996 which became final on July 16, 1996. At that time, only two months and a few days had elapsed and more than ten months remained of the one year period for statute of limitation. Because my initial application sparked a properly filed writ of habeas corpus, the one year period was met long before any considerable delay had elapsed was irrelevant to my second filing of June 10, 1997. As a pro se litigant it can not be said I failed to act diligently. Secondly, in further opposition to respondent's position, counting from January 5, 1996 til June 10, 1997, there was no serious deliberating time span between the state final judgment til the second filing of my motion; the direct state appeal review had only became final one year slightly from petitioner second habeas corpus filing which should not bar review of petitioner's application. As cited by the respondent at page four of their motion to dismiss

paragraph 9-10 of the recent decision(s), applying *Peterson* v. *Dempsky*, 107 F.3d 92 (2d Cir. 1997), in those cases cited by respondent in their exhibits presented before Your Honor, all of the petitioners in those cases had had year(s) to contemplate bringing their federal habeas corpus petition and did not do so, the Second Circuit in Peterson held there and in new similar situation alike there was no need to allow a full year after the enactment of the Statute. Here, my direct appeal finalized relatively well within the bounds of the most logicalistic "reasonable period" standard invoked in *Peterson*. There was absolutely no lengthy contemplation period alive in my factual circumstances before I brought my two federal habeas corpus Petition in close intervals of each other (see, 28 U.S.C. Sec. 2244(d), (2)). I ask in humility based on the above that my petition not be dismissed. Lastly, respondent have utterly failed to satisfy even remotely it burden of demonstrating particular prejudice, how I cause such prejudiced by filing my application less than a one year mark — nor had I neglected years before bringing on the instant application for a writ, and that I was not diligent (please, see, N.Y.L.J. Aug. 8th, 1997, page (2) Col;. (3), *Hughes* v. *Irvins* Supt. Wende Corr. Fac. 97 CV 365 (E.D.N.Y. June 25, 1997). By Judge Raymond J. Dearie denying "respondent's" motion to dismiss a habeas corpus untimely or barred by laches.

WHEREFORE, Petitioner pray deeply for this Court to forwith allow me to proceed on the merit of my application and for such other grants this Court deem lawful.

Petitioner's Reply Affidavit with Exhibits

__ day of _____, 1997.

I, *Sherman Walker*, declare the above is true under the penalties of perjury

s/ Sherman Walker

To: Efrem Z. Fischer
Assistant Attorney General
120 Broadway
N.Y., N.Y. 10271

Petitioner's Reply Affidavit with Exhibits

EXHIBIT (A)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT C. HEINEMANN
CLERK

JAMES GIOKAS
CHIEF DEPUTY

June 18, 1996

Sherman Walker
92 A 7141
Drawer B
Stormville, NY 12582-0010

Re: 96-CV-2946 (SJ)

Dear Pro Se Litigant:

This will acknowledge receipt of your complaint. The case has been docketed under the above number and assigned to the Honorable Sterling Johnson, Jr. Your submitted documents have been forwarded to Judge Johnson's for consideration.

Please be advised of the following:

— documents submitted for filing should be originals and *must* contain an original signature;

— an affidavit of service must be included with all documents sent in for filing;

— all documents should be sent to the Pro Se Office at the Brooklyn courthouse. DO NOT send any paperwork directly to chambers unless directed to do so by the Judge as mailing your papers to chambers will delay processing;

— it is your duty to keep this office informed of any change of address;

— copies of all items filed in your case will be mailed to you by either the Clerk or opposing counsel. It is your responsibility to retain those copies, as well as copies of any documents you file, and monitor the progress of your action yourself.

Sincerely yours,

s/ Erin A. Cottingham
Erin A. Cottingham
Pro Se Writ Clerk

Petitioner's Reply Affidavit with Exhibits

EXHIBIT (B)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

96 CV 2946

SHERMAN WALKER,

Plaintiff,

– against –

THE LEGAL AID SOCIETY, PHILIP WEINSTEIN, JOEL ATLAS, JAMES BRANDEN, HILLAR WIESE, ALDEN LEWIS, SAMUEL FELDMAN, and CHRISTOPHER ARTUZ, Superintendent of the GREEN HAVEN CORRECTIONAL FACILITY,

Defendants.

MEMORANDUM AND ORDER

* * *

JOHNSON, District Judge:

Sherman Walker ("plaintiff" or "Walker"), appearing *pro se*, brings this action pursuant to 42 U.S.C. § 1983 alleging that a number of lawyers associated with the Legal Aid Society and in private practice violated his right to counsel and due process of the law. Plaintiff also seeks habeas corpus relief pursuant to 28 U.S.C. § 2254. For the

reasons stated below, the motion to proceed *in forma pauperis* is granted, but the complaint is dismissed *sua sponte* in accordance with 28 U.S.C. § 1915(d).

BACKGROUND

In three separate state court trials — one in New York County, and two in Queens County — Plaintiff was convicted on robbery charges. In each case, the Legal Aid Society was appointed to represent plaintiff in the appeal of his conviction. In the course of representing Walker, however, it became apparent that the Legal Aid Society already represented a confidential informant who had been a primary source of information leading to plaintiff's arrest. Because representing both clients would pose a conflict of interest, the Legal Aid Society formally moved to be relieved as counsel on plaintiff's appeals. The state appellate courts granted this motion and appointed new counsel to prosecute plaintiff's appeals.

Walker now argues that no confidential informant existed and thus that there was no conflict of interest preventing the Legal Aid Society from representing him. Plaintiff contends that, although he notified the Legal Aid Society of this fact, they failed to investigate his claim. Plaintiff argues that the Legal Aid Society's improper withdrawal denied him of his right to the counsel of his choice and due process of the law.

Accompanying plaintiff's complaint was an application to proceed *in forma pauperis*.

Petitioner's Reply Affidavit with Exhibits

DISCUSSION

Under 28 U.S.C. § 1915, a district court may dismiss a case in which the plaintiff has applied to proceed *in forma pauperis* "if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." 28 U.S.C. § 1915(d). The Second Circuit follows a two-step approach in establishing eligibility to proceed *in forma pauperis* by first assessing a plaintiff's financial status, followed by a determination as to the frivolousness of the action. *See Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983).

Applying the two-step approach to the present case, this Court finds that plaintiff satisfies the financial requirements to proceed *in forma pauperis*. Based on the allegation of poverty stated in his declaration, the Court is convinced that Walker is unable to pay the costs and filing fees in connection with this suit. Thus, plaintiff's motion for leave to proceed *in forma pauperis* is granted.

Nevertheless, plaintiff's complaint must be dismissed. First, to establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate that the conduct complained of was committed by a person acting under the color of state law and that the conduct deprived the plaintiff of a federal right. *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). The United States Supreme Court has stated unequivocally that court-appointed lawyers do not act under color of state law within the meaning of § 1983. *See Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender does not act under color of state law); *Cassidento v. Hammer*, 1995 WL 722536 (2d Cir. 1995) (court-appointed attorney does not act under color of state law). As such, plaintiff's claims against all of the

individual attorneys as well as the Legal Aid Society must be dismissed. *See Pino v. Ryan*, 49 F.3d 51 (2d Cir. 1995) (*sua sponte* dismissal may be based on an affirmative defense that appears on the face of the complaint).

Plaintiff's claim for habeas corpus relief also must be dismissed for failure to adequately set forth his claim. For instance, although plaintiff refers to state appellate proceedings relating to his robbery convictions, he fails to specify the claims litigated in those appeals. Because this court cannot determine which issues have been properly exhausted in state court, the essential allegations of a habeas corpus action have not been presented. *See* 28 U.S.C. § 2254(b) (writ of habeas corpus "shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State"). Therefore, this claim is dismissed without prejudice.

CONCLUSION

For the reasons stated herein, plaintiff's motion to proceed *in forma pauperis* is granted. However, the Court finds plaintiff's complaint to be frivolous within the meaning of 28 U.S.C. § 1915(d), since it fails to state a cognizable claim under 42 U.S.C. § 1983 or 28 U.S.C. § 2254. Accordingly, plaintiff's complaint is dismissed without prejudice.

SO ORDERED.

s/ Sterling Johnson, Jr.
U.S.D.J.

Dated: Brooklyn, New York
July 9, 1996

VERIFIED COMPLAINT DATED APRIL 10, 1996

CV 96 2946

SHERMAN WALKER,

Plaintiff-Appellant,

– against –

LEGAL AID SOCIETY ex rel, 15 Park Row, N.Y., N.Y.; PHILIP L. WEINSTEIN; JOEL ATLAS, JAMES M. BRANDEN; HILLARD WIESE, ESQ.; ALDEN T. LEWIS, ESQ., 527 Quincy St., Brooklyn, N.Y. 11221; SAMUEL FELDMAN, ESQ., 350 Broadway, N.Y., N.Y. 10013,

Defendants,

– against –

ARTUS, SUPERINTENDENT OF GREEN HAVEN CORRECTIONAL FACILITY,

Defendant.

VERIFIED COMPLAINT
TRIAL DEMANDED

Plaintiff, by his *pro se* petition, complains of the defendants and respectfully shows to this Court, alleges that defendants violated certain rights guaranteed under the United States Constitution by harming the Plaintiff by means of delayed imprisonment, discrimination, negligent, nominal misrepresentation by permitting a pattern of illegal

procedures and illegal treatment and abuse which was known to them or which should have been known to them under the law to take place against the plaintiff.

JURISDICTION

This action is brought pursuant to 42 U.S. Sec. 1983 and 1988 and pursuant to 28 U.S.C. Sec. 2254 as well as the First, Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Jurisdiction is founded upon 28 U.S.C. Sec. 1331 and 1341(3) and (4) and the aforementioned Constitutional and Statutory provisions. Plaintiff, further invokes the pendant and jurisdiction of this court to hear and decide his claims arising out of state law.

PARTIES INVOLVED

(1) Plaintiff, at all times mentioned herein, was and is a citizen of the United States and a resident of the County of Kings, City and State of New York.

(2) At all times mentioned herein, the defendant, Legal Aid Society, 15 Park Row, New York, New York 10038, was and still is a division of and/or a municipal corporation agency and/or administrative agency operating, organized, and existing under and by virtue of the charter and lawful authority of said county.

(3) Defendants, PHILIP L. WEINSTEIN; JAMES BRANDEN, ESQ.; JOEL ATLAS, HILLARD WIESE, ESQ., upon information and belief, were and still are owners of and in possession and exclusive control of a certain

premises at the Legal Aid Society, 15 Park Row, New York, New York 10038.

(4) At all times mentioned herein, the defendants, LAW OFFICE, 527 Quincy Street, Brooklyn, New York 11221 and LAW OFFICE, 350 Broadway, New York, New York 10013, were and still are divisions of and/or independent corporation agencies, or municipal corporation agencies and/or administrative agencies operating, organized, and existing under and by virtue of the chapter and lawful authority of each said county, by MR. LEWIS and MR. FELDMAN, respectively.

(5) Defendant Artus at all times mentioned herein, was and still is in charge of said place of plaintiff confinement at Green Haven Correctional Facility, and in charge of its functions and in possession and exclusive control of certain premises and its authority or sentenced prisoners respectively; he functions in the capacity as the Facility Superintendent.

(6) Upon information and belief, each defendant herein were acting in their official capacity and/or each of them acted in the furtherance of their own interest and acting under color, to wit, under color of the statues ordinances, regulations, policies, customs usage of The United States Of America and the State Of New York. All defendants herein and out are sought to be sued in their individual capacity as well as sued in their official capacity respectively.

(7) Plaintiff, humbly urges this court to conduct investigations into the background of his complaint(s) and grant him a

counsel to assist him at each and every stage of proceeding, that the court may due consideration of his claim.

(8) Prior to the commencement of this action, the plaintiff had duly complied with all of the conditions precedent to the bringing of this action and complied with the provisions of the law. On or about the __ day of Nov., 1995, plaintiff filed a writ of error coranobias with the State Appellate Division thus exhausting his state action, which became final on the 18th day of March, 1996, and led to the commencement of this action, and

STATEMENT OF CLAIM AND
FACTUAL HISTORY

JAMES M. BRANDEN, an Attorney associated with PHILLIP L. WEINSTEIN, Esq., whom were assigned by order of the Appellate Division First Department date March 24, 1992, to represent the Plaintiff on his Appeal from a Judgment of the Supreme Court, New York County, under Indictment #338/91, rendered on February 13, 1992, convicting Plaintiff after a Jury Trial of Robbery in the First Degree [P.L. 160.15] and Robbery in the Second Degree [P.L. 160.10] and Sentencing thereon (Uviller, J. at Trial and Sentence). Plaintiff's state Appeal was denied by the App. Div. 1st. Dept., on 3rd day of Oct., 1995. (see Ex. (A) Enclosed herein).

Additionally, PHILLIP L. WEINSTEIN, Esq., was assigned to represent Plaintiff on his Appeal of a Judgment of the Supreme Court, Queens County, under Indictment #6542/89 rendered on __ day of Feb. 1993, convicting

Plaintiff after a Jury Trial of Robbery in Second Degree [P.L. Section 160.10] and Sentencing him thereon (Beerman, J., at Trial and Sentence) and PHILLIP L. WEINSTEIN, Esq., was assigned to represent Plaintiff on his Appeal of a Judgment of the Supreme Court, Queens County, under Indictment #2120/91 rendered on 6th day of June, 1992, upon an Alford Plea to Robbery in the Second Degree [P.L. Section 160.10], to run concurrent with Indictment #6542/89 (Beerman, J. at Sentence). Plaintiff's state Appeal was denied by the App. Div. 2d. Dept., on 12 day of June, 1995. The Motion for Leave to Appeal to the Court of Appeals was denied on 5th day of Jan., 1996 (see Ex. (A) Enclosed herein).

Plaintiff, also state(s) that the Defendant(s) were all made familiar with the proceedings in these case(s) and have supposely willfully neglected to examined the record below as to allege "informant" in question hereinout fully and carefully:

After the Wade Hearing but prior to Trial under Indictment #2120/91 (Queens County), Plaintiff Trial Counsel had received additional *ROSARIO* material. From one of the documents turned over, Trial Counsel learned that a Detective Jame Redmond #2970, the Arresting Officer of Plaintiff out of Queens County had allegingly spoken with a "so-called confidential informant", who allegingly happened to be represented by the Legal Aid Society at the time. Trial Counsel stated on record that upon information and belief, [he] believed [the Confidential Informant] was the source of the information which led to the Plaintiff being placed in lineup(s) and then ultimately, to arrest Plaintiff. In no material way were these facts investigated by the

Defendant(s) herein ever when Plaintiff brought to their attention that no confidential informant had existed as falsely claimed by the Detective Redmond #2970 during the Queens proceedings. (see Ex. (B) Enclosed herein).

Under these circumstances, it did not constitute a "conflict of interest" for Defendant JAMES M. BRANDEN, to represent Plaintiff on his Appeals in his case, and the fact that the Legal Aid moved to be relieved as Counsel on Plaintiff Appeals did violate Plaintiff Civil Rights and Due Process of Law.

Moreover, because the Defendant(s) JAMES M. BRANDEN, HILLIARD WIESE, JOEL ATLAS, ALDEN T. LEWIS and SAMUEL FELDMAN, Esq., intentionally failed to investigate the background of this alleged incriminating source supposely represented by the Legal Aid Society also led to Plaintiff not being represented under all of his Appeals by (right) by the Legal Aid Society (see, Exhibit (B) Enclosed herein). On or about May of 1993 violate Plaintiff Appellate right(s).

* * * * * * *

FOR A FIRST CAUSE OF ACTION, THE PLAINTIFF, SHERMAN WALKER, ALLEGES AS FOLLOWS:

Plaintiff notified the Defendant(s) Legal Aid Society respectfully of the lack of conflict on or about the year 1994, and requested that they move to correct the re-assignment of appellate counsel. The Defendant(s) never done anything (see Ex. (B) Enclosed herein).

Verified Complaint Dated April 10, 1996

Plaintiff, notified the Defendant(s) LEWIS and FELDMAN of the lack of conflict on or about the year 199(4)(5), and requested that they move to correct the re-assignment of appellate counsel for representation by Legal Aid Society. The Defendant(s) never done anything; instead the Defendant(s) Legal Aid Society neglected to investigate that no "conflict of interest" existed in any aspect of their representation, and deprived Plaintiff of his Constitutional rights and Due Process of the Law.

The neglect to search out that no actual conflict of interest existed disrupted the Defendant's Legal Aid Society professional duties to actions best suited to further Plaintiff's Appeals interests. By each Defendant's willful neglect into the background of the allege confidential informant existence, each Defendant became careless to exercise his independent professional judgment to aid Plaintiff Appellate process from the very beginning of the process.

Plaintiff, assert that his sworn affidavit from a Mr. Terrence proves that there never existed a conflict of interest. Mr. HEYWOOD, sworn that he never performed any informant work and denied ever informing against the Plaintiff in the past. Plaintiff, further state that Defendants were also negligent in not clearing this mishap up before the Court which granted Defendant motion to be relieved; had they done so they would have discovered a very important and relevant information that Detective JAMES REDMOND, had pre-fabricated the story of an alleged informant during the Queens Wade Hearing, thus, building a false version of a conflict of interest to alleging appear during WALKER'S Appeal stages (see Exhibit (C) attached herein).

Verified Complaint Dated April 10, 1996

PETITION FOR FEDERAL WRIT OF HABEAS CORPUS

That the illegal detention of WALKER reads as follows:

That under this part of WALKER complaint Walker contends that misrepresentation toward(s) correcting the alleged issue of a conflict of interest and in briefing, hearing and deciding of his Appeal violated his Right to Counsel and Due Process of Law.

WALKER, makes a Due Process claim for inconscionable Appellate delayed nominal misrepresentation resulted in a deprivation of a fundamental Constitutional Right.

Despite having advised the Chief Attorney in charge of Legal Aid Society of the Attorney JAMES BRANDEN delinquency at correcting the apparent misrepresentation, the remainder of the Appeal Legal Aid Society never moved to checked into their client information that shedded light on the non conflict of interest claim, nor removed BRANDEN and re-assigning new Appellate Counsel out of the firm to properly represent WALKER'S Appeal (i.e. their failure to due so denied him Right to Counsel on his Appeal). The two appoint 18-B Counsel should not have been assigned to WALKER'S case at all quite clearly, the Legal Aid Society did not exercise institutional vigilance in keeping track of its Attorney action(s) and work, blocked WALKER from receiving Legal Aid representation as noted under A.B.A. Code of Professional Responsibility, DR5-105 (A, C). Since Appellate's Appeal was actually heard, and since he was misrepresented by counsel's not assigned as of (right) on

his Appeal, the prejudice WALKER suffered from this neglect deprived him of a fundamental Constitutional Right to obtain a fair review of his convictions while properly represented by Legal Aid when initial assignment (see DR5-105(c))*

WALKER, argues he is nevertheless entitled to release, alternatively, a new Trial because this "delayed nominal" misrepresentation of his Appeal cannot cure the Per Se Due Process violation and resulting prejudice of his deprived Right to Counsel.

WALKER, also argue that the remedy of a new Appeal would be inappropriate and that he is entitled to unconditional release alternatively, a new Trial, because a new Appeal would in no fashion redress the deprivation of a fundamental Constitutional Right to be represented by Counsel as of (right) A.B.A. Code of Professional Responsibility, DR5-105(c). Specifically, his original Attorney Legal Aid was acting contrary to the Provisions of Disciplinary Rule DR5-105(c) and to the extent permitted under DR5-105(a).

PREJUDICE CRITERIA ASSERTED TO WARRANT FEDERAL HABEAS RELIEF OF UNCONDITIONAL RELEASE. 28 U.S.C.A. CONST. AMEND. 14, or NEW TRIAL

First, the length of the "delayed nominal" misrepresentation was clearly prejudice; WALKER, Appeal

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* WALKER, state that the failure to correct the deficiency of assigned Counsel Constitute State exhausted action as well.

was not routine and was not actually perfected within the required period of time by his original assigned Attorney as of right. Second, no acceptable reason for this misrepresentation can be justified as to why the alleged conflict of interest claim thoroughly existed; which the Legal Aid neglected to supervise it appointed Attorney(s) to monitor BRANDEN critical Legal steps taken in WALKER case. Third, WALKER assert that prejudice was felt because he did not waive his Right to Appeal and to be represented by his assigned Counsel as of right; instead WALKER repeated efforts to alert Legal Aid went in vain. Finally prejudice can be seen because of each Attorney 18-B appoint Counsel Poor quality and that poor quality undermined the outcome of the Appeal and that WALKER labored under a conflict of interest during these Counsel representation. In light of these circumstance, this neglect to correct the problem prejudiced WALKER to Due Process Right to a Speedy Appeal and to be represented by his Counsel as of right. Canon 9; A.B.A. Code of Professional Responsibility, DR5-105 (A, C).

(9) As a result of the Defendants "nominal misrepresentation, and neglection Plaintiff suffered serious physical and emotional injury, resulting in among other things, excruciating pain and humiliation for being ignored by the Defendant(s) whom deprived Plaintiff of a just opportunity to be adequately represented on his Appeal. Moreover, the lose of Plaintiff to be represented by his original assigned Appeal Attorney because of deliberate neglect Plaintiff suffered severe emotional distress.

Verified Complaint Dated April 10, 1996

(10) No previous motion of this kind have been made in the Supreme Court of New York and/or a Federal Court of the United States.

WHEREFORE, Plaintiff demand Judgment as follow pursuant to 42 U.S.C.A. Section 1983.

(1) On the first cause of action, Judgment in favor of Plaintiff SHERMAN WALKER, against Legal Aid Society ex rel., PHILLIP L. WEINSTEIN, JOEL ATLAS, JAMES M. BRANDEN, HILLARD WIESE, ALDEN T. LEWIS and SAMUEL FELDMAN; Defendant(s) respectively in the sum of $(8),000,000,000 compensatory damages and $(8),000,000,000 punitive damages;

(2) Declare that the practice of each defendant(s) in denying Plaintiff his Right to Counsel on his Appeal and violated him Due Process of Law secured under the Constitution.

• Federal Habeas Corpus relief pursuant to 28 U.S.C.A. Section 2254(a).

(1) That Appellate be relief from custody unconditionally or alternatively Order a newer Trial; Plaintiff – Appellant, demand his respective Judgment(s) together with cost and disbursements of thus action, and any different relief as to this Court seem just and proper before its eyes.

Verified Complaint Dated April 10, 1996

DATED: 10th day of April, 1996
County of _____

Respectfully Submitted,

s/ Walker, Sherman
Mr. Sherman Walker
Plaintiff – Appellant

Sworn to before me this
10th day of April 1996

s/ Rodrigo Blake 4/10/96
NOTARY PUBLIC

RODRIGO BLAKE
Notary Public, State of New York
No. 1-8689
Qualified in Manhattan County
Term Expires March 1, 1997

ORDER OF THE COURT OF APPEALS OF NEW YORK DENYING LEAVE TO APPEAL DATED DECEMBER 7, 1995

COURT OF APPEALS OF NEW YORK

[NO NUMBER IN ORIGINAL]

People, Resp. v. Walker (Sherman), App.

* * *

December 7, 1995

PRIOR HISTORY:
NY County; AD 1st; order October 3, 1995.

JUDGES: Smith, J.

OPINION: LEAVE TO APPEAL

Denied

ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT DATED, DECIDED AND ENTERED OCTOBER 3, 1995

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

55664

The People of the State of New York,

Respondent,

v.

Sherman Walker,

Appellant.

* * *

October 3, 1995, Decided
October 3, 1995, ENTERED

* * *

JUDGES: Concur — Sullivan, J. P., Ellerin, Rubin, Kupferman and Asch, JJ.

OPINION: Judgment, Supreme Court, New York County (Rena Uviller, J.), rendered February 13, 1992, convicting defendant, after a jury trial, of robbery in the first and second degrees, and sentencing him, as a second felony offender, to concurrent terms of 12 1/2 to 25 years and 7 1/2 to 15 years, respectively, unanimously affirmed.

The voucher for defendant's eyeglasses taken from him at the time of his arrest, which voucher was not turned over to the defense until the middle of trial, did not constitute *Rosario* material (*People v Rosario*, 9 NY2d 286, *cert denied* 368 US 866; CPL 240.45[1][a]) with respect to Detective Mullin's testimony, since it did not contain any statements or descriptions of the events or participants in the incident, was not completed by that detective, and the item vouchered did not relate to the detective's direct testimony (*see, People v Miranda*, 192 AD2d 352, 354). Although it is also questionable whether or not the voucher related to the testimony of Detective Favilla who prepared the document, the voucher was turned over to the defense prior to his testimony and the sanction imposed by the trial court, striking certain testimony and precluding the prosecutor from questioning Favilla with respect to the voucher, cured any prejudice caused by any violation of the *Rosario* rule (*see, People v Ranghelle*, 69 NY2d 56, 63; *cf., People v Jarrells*, 190 AD2d 120). Defendant's *pro se* contention that the failure to timely turn over two detective's reports (DD5's) also constituted a violation of the *Rosario* and *Brady* rules (*Brady v Maryland*, 373 US 83) is similarly without merit since the detective who prepared the documents did not testify at trial (CPL 240.45[1][a]) and since the information contained therein did not tend to exculpate him or affect the credibility of a witness who testified at trial.

It was not an improvident exercise of discretion for the trial court to have denied the defense application to relieve counsel prior to and during the pretrial suppression hearing nor was good cause demonstrated requiring a hearing on the matter (*see, People v Smith*, 192 AD2d 310, *affd* 82 NY2d

731; *People v Newell*, 200 AD2d 451). In light of the conclusory assertions proffered in support of the application and the fact that the case had been pending before the trial court for several months, "the court had a clear picture of the 'nature of the disagreement' between defendant and counsel and its 'potential for resolution' ", and was therefore in the best position to determine the merit of the application (*People v Smith, supra*, at 312, quoting *People v Sides*, 75 NY2d 822, 825). The fact that the court granted counsel's ex parte application for the same relief at the conclusion of the hearing, based on his assertion that defendant had threatened him, in no way indicated that counsel's representation of defendant during the hearing was compromised by any alleged threats. The record reveals that the dissolution of the attorney/client relationship based on defendant's actions occurred after the hearing was completed.

Defendant's additional *pro se* contention that he was also deprived of the effective assistance of trial counsel may not be reviewed on appeal since he relies on facts dehors the record (CPL 440.10; *see, People v Brown*, 45 NY2d 852, 853-854).

We have considered defendant's remaining contentions including that raised in his *pro se* supplemental brief, and find them to be without merit.

Concur — Sullivan, J. P., Ellerin, Rubin, Kupferman and Asch, JJ.

CERTIFICATE OF THE STATE OF NEW YORK, COURT OF APPEALS DISMISSING APPLICATION DATED JANUARY 5, 1996

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

Ind. No. 6542/89
2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to Section 460.20 of the Criminal Procedure Law is dismissed because application for the same relief has already been made to and denied by order of the Appellate Division dated October 3, 1995 (CPL Section 460.20; *People* v. *McCarthy*, 250 NY 358, 361).*

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* Description of Order: Order of the Appellate Division, Second Department, dated June 12, 1995, affirming a judgment of Supreme Court, Queens County, rendered February 27, 1992.

Certificate Dismissing Application

Dated: Albany, New York
January 5, 1996

s/ George Bundy Smith
Associate Judge

CERTIFICATE OF THE STATE OF NEW YORK, COURT OF APPEALS DISMISSING APPLICATION FOR RECONSIDERATION OF APPEAL DATED JANUARY 5, 1996

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH,
Associate Judge

Ind. No. 2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

SHERMAN WALKER,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, certify that the application by the defendant-appellant for a certificate to appeal pursuant to §460.20 of the Criminal Procedure Law is dismissed because the order* sought to be appealed is not appealable under Criminal Procedure Law, §450.90(1).

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* Description of Order: Order of the Appellate Division, Second Department, dated October 3, 1995, denying defendant's motion for reconsideration of an appeal determined by order of the Appellate Division dated June 12, 1995, affirming a judgment of Supreme Court, Queens County, rendered February 27, 1992 or for leave to appeal to the Court of Appeals.

Certificate Dismissing Application re Appeal

Dated: Albany, New York
January 5, 1996

s/ George Bundy Smith
Associate Judge

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ON MOTION DATED OCTOBER 3, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-04929

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. No. 2120/91)

DECISION & ORDER ON MOTION

Motion by the appellant for reargument of an appeal from a judgment of the Supreme Court, Queens County, rendered June 16, 1992, which was determined by decision and order of this court dated June 12, 1995, or, in the alternative, for

leave to appeal to the Court of Appeals from the decision and order of this court, or, in the further alternative, for an enlargement of time to file a brief in support of the motion.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied.

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

October 3, 1995

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, NO. 92-01662 DATED JUNE 12, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-01662

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. No. 6542/89)

Submitted — February 2, 1995

DECISION & ORDER

* * *

Decision and Order, No. 92-01662, Dated June 12, 1995

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Beerman, J.), rendered February 27, 1992, convicting him of robbery in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The trial court properly ruled that the defendant's arrest photograph was admissible on redirect examination in response to the defendant's lengthy inquiry into the complaining witness's recall of the robber's identifying characteristics. The photograph confirmed the complainant's testimony that the robber was wearing a dark grey jacket at the time of the attack (*see, People v Dent*, 183 AD2d 723; *People v Santana*, 162 AD2d 191; *People v Rios*, 156 AD2d 397).

The failure of the complaining witness to inform the detective in an unrelated criminal investigation that the defendant, who he picked out of a lineup and whose photograph he picked out of a photo array, had also been his assailant in the present crime, did not constitute exculpatory evidence, since there is no indication that the complainant was ever questioned concerning the instant offense. Therefore, evidence of the "fact" in question was not *Brady* material which the People were obliged to turn over to the defense.

The defendant's sentence was not excessive (*see, People v Suitte*, 90 AD2d 80).

Decision and Order, No. 92-01662, Dated June 12, 1995

We have considered the defendant's remaining contentions, including those raised in his supplemental *pro se* brief, and find them to be without merit.

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

June 12, 1995

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, NO. 92-04929 DATED JUNE 12, 1995

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-04929

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. No. 2120/91)

Submitted — February 2, 1995

DECISION & ORDER

* * *

Decision and Order, No. 92-04929, Dated June 12, 1995

Appeal by the defendant from a judgment of the Supreme Court, Queens County (Beerman, J.), rendered June 16, 1992, convicting him of robbery in the first degree, upon his plea of guilty, and imposing sentence.

ORDERED that the judgment is affirmed.

Contrary to the defendant's contention, the record demonstrates that the People did not fail to turn over the *Rosario* material in question *(see, People v Johnson*, 155 AD2d 339).

Prior to executing an order to remove the defendant from jail and place the defendant in a lineup, the People were under no obligation to first attempt to contact the assigned attorney who had represented the defendant in an unrelated criminal matter (*cf., People v Coates*, 74 NY2d 244, 249). In any event, we note that the defendant was represented at the lineup by an attorney who had been appointed for him by the Queens County Supreme Court. Furthermore, the record does not support the defendant's contention that the lineup was unduly suggestive (*cf., People v Bady*, 202 AD2d 440).

The defendant's contention that his sentence was excessive is without merit *(see, People v Suitte*, 90 AD2d 80).

The defendant's remaining contentions, including those raised in his supplemental *pro se* brief, are without merit.

Decision and Order, No. 92-04929, Dated June 12, 1995

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

June 12, 1995

SUPPLEMENT FOR APPELLANT WITH ATTACHED EXHIBITS FILED IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

To be argued by
ALDEN T. LEWIS, Esq.
(20 Minutes)

Supreme Court of the State of New York
Appellate Division: Second Department

Case No.:
92-01662
92-02880
92-04929
(Heard on the original record)
Ind. No.:
6542/89
2119/91
2120/91

The People of the State of New York,

Respondent,

vs.

SHERMAN WALKER,

Appellant,

SUPPLEMENT FOR APPELLANT

* * *

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Case No.:
92-01662
92-02880
92-04929
(Heard on the original record)

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

SHERMAN WALKER,

Appellant.

PRELIMINARY STATEMENT

This is a supplemental brief submitted in further support of appellant's appeal from a judgment of convictions of the Supreme Court, Queens County, rendered after trial, (Beerman, J.), on Jan. 30, 1992 and sentence to seven to fourteen years imprisonment under IND. NO.: 6542#89; on 6th day of June, 1992, appellant was illegally sentenced under IND. NO. 2120#91 (Beerman, J.) to seven to fourteen years to run concurrent with respect to indictment 6542/89; appellant was also sentenced after a jury trial of Robbery in the Third degree, on 9th day of April, 1992, before Acting Justice (Hon. Beerman) to three and a half to seven years to run consecutively with the above imposed convictions.

Supplement for Appellant with Attached Exhibits

This Court granted appellant permission to file a supplemental brief in connection with appellant Counsel main brief on 24th day of April, 1994.

Appellant is incarcerated pursuant to the above judgment of convictions.

STATEMENT OF FACTS[1]

Procedural History

An application was made by the District Attorney Office of Queens County, proceeded by Order to Show Cause without proper notice to appellant then retained Counsel for an order compelling the appellant to stand in lineups (*see*, appellant Exhibit (A) attached hereto).

Prior to the issuance of the order, the appellant was incarcerated on an unrelated charge; also appellant was tentatively identified by photographs on Jan. 15, 24, 25, 1991, as the person who was alleged to have forcibly taken property from people known to Detective Redmond sh#2970 (Hr.1: 6-13);

Since appellant was alleged to have been a suspect in the crimes the people allowed various alleged witness(es) who presumably had tentatively identified appellant photograph to view him in the lineups that were held adequate probable cause.

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1. Transcript Pages preceded by a (Hr.1.:) refer to the pages of the Wade transcripts of Dec. 2, 1991; the transcript pages preceded by a (Hr.2.:) refer to pages of the Wade held Dec. 3, 1991, [Cover indicates 12/6/91].

Supplement for Appellant with Attached Exhibits

On March 27, 1991, on or about 1:15 P.M., in the B'klyn House of Detention the appellant was involuntarily transported to the 109 Pct., to participate in lineups in Queens County. Upon arriving at the Precinct appellant request for Counsel retained was denied (Hr.2.: 14, 15, 50-60). Instead, a Court appointed 18B attorney was improperly allowed to represent appellant and another individual that during the lineup proceeding, based upon which appellant was selected out of five lineups.[2]

The District Attorney Office was aware that retained Counsel was representing appellant in a case actually pending on the same date the lineups were conducted. This pending case was in Part k-9 the Supreme Court County of Queens under Indictment 6542#89. They were also aware that retained Counsel had represented appellant in a case pending in New York County under IND. NO. 338#91 and Kings County under IND. NO. 410#91.[3] In spite of this knowledge the District Attorney Office failed to "notify" retained Counsel that an order to show cause had been made on March 22, 1991. (*See*, appellant Exhibit (B) attached hereto).

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2. The five indictment appellant was initially charged with the Court dismissed three of the remaining indictment for lack of speedy trial.

3. (Hr.1.: 34-40) show Det. Redmond awareness of appellate unrelated charges when he communicated with other Detectives who had arrested appellant on separate charges before the Queens lineup(s).

Supplement for Appellant with Attached Exhibits

Appellant Contentions:

That the lineup-order was improper in that appellant counsel was not presented with any facts which might establish a basis for appellant being placed in lineup(s). Without such a basis SERVED on appellant Counsel appellant was improperly seized and any subsequent lineups, should have been suppressed; (2) and that the order to show cause setting forth specifics as to the connections of the complainants and witness(es) was absence a showing of probable cause to arrest appellant for each separate crime (See, Exhibit (B), supra).

Wade Hearings[4]

Proceedings of Dec. 2, 3, 1991; Feb. 1, 11, 1992.

The first Wade hearing started and was finished under indictment number 2119#91 on Dec. 2, 1991; the second Wade hearing preceded on Dec. 3, 1991 til Feb. 10, 11, 1992, respectively.

DETECTIVE JAME REDMOND, was the only witness called by the Prosecutor. He testified that he was a detective since 1980 and that he was in charge of the investigation under both indictments. He also stated that he obtained photographs of appellant and others he took them to the witness(es) for viewing on Jan. of 1991. Redmond was in charge of conducting seven illegal lineups against appellant.

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4. At this level the facts pertains to both lineup cases for expedient purposes for this Court and to avoid repetition.

Supplement for Appellant with Attached Exhibits

As a result the official made insufficient effort to contact appellant retained Counsel (Hr.2.: 90); and that the lower Court improperly ruled as a matter of fairness that there was no need to consolidate the "Hearings" as to all of the indictments (Hr. 1.: 75-80).

Right to Counsel attached

In this case the right to Counsel had attached by virtue of the issuance of the Court ordered lineups and a plain reading of the record it becomes clearly that appellant right to Counsel was unfairly blocked.

Appellant Contentions:

That the officials conducting the lineups caused appellant to suffer the denial of his retained Counsel for failure to notify said Counsel of the impending lineups.

Defense

Appellate Counsel presented no evidence.

The Decision on the Hearing Court

In two consecutive decision (Justice Beerman) denied appellant's motion to suppress the identification testimony under indictment 2119#91 and 2120#91.

Supplement for Appellant with Attached Exhibits

Sentence under Ind. No.: 2120#91[5]

The Court denied appellant's application to withdraw his tainted Alford plea was an abuse of discretion (S.1.:).

SUPPLEMENTAL ARGUMENT

POINT I

APPELLANT CONVICTION MUST BE REVERSED ON THE GROUND THAT APPELLANT WAS SUBJECTED TO UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF APPELLANT RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS (N.Y. CONST., ART. I SEC.12; U.S. CONST., 4th and 14th Amdt.).

The issue presented today before this Honorable Court is indeed a noble one which demands the application of the N.Y. CONST., ART. I SEC. 12; U.S. CONST., 4th and 14th Amdt., which shall cure the violation unreasonably committed against appellant.

Going right to the problem, which is like the problem corrected in the Matter of *Santucci* vs. *Andrew*, 117 Misc. 2d 616, 458 N.Y.S.2d 1007 – at p. *1008* (Sup. 1983) where Justice Cornelius O'Brien, held that a prospective defendant, subjected to be viewed in a lineup by witness(es) to an alleged crime, he may not be viewed by witness(es) to other crimes in connection with which he may be a suspect, absent a showing of probable cause to arrest him for each crime.

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5. Transcript pages preceded by a (S.1.:) refer to the pages of the Sentencing Minutes of June 6th 1992 [cover indicates 6/ /92].

Supplement for Appellant with Attached Exhibits

In the case at bar, the People's Order to Show Cause was devoid as to setting forth specifics as to who were to view the prespective appellant and their connection to the events surrounding the alleged crime, therefore, an order should not have been signed to effectuate the lineup(s) proceeding in that it was absence a showing of probable cause to arrest the appellant for each separate crime. Applying, that same analysis, here, as applied in *Santucci* vs. *Andrew*, the application of the people should have been denied. Moreover, the detention of appellant in order that he be made to participate in a lineup to be viewed by witness(es) who had allegingly photographically identified him as the individual who committed the allege crime was improper in that it constituted a seizure without adequate basis. *See*, *e.g.*, *Santucci* vs. *Felix Logoa*, 117 Misc. 2d 500, 458 N.Y.S.2d 1009 at p. 1010 (Sup. 1983); *see*, *also*, *Alphonso C.* vs. *Morgethau*, 50 A.D.2d 97, 376 N.Y.S. 2d 126, at p. 128 (1st. Dept. 1975) where the Appellate Division First Department deciding the exact same issue before this Court denied the District Attorney Office application for a Want of Power. There that Court also took note that that type of seizure based on inadequate basis was not permitted. *Cf.*, the *Matter of Mackerl* vs. *Palermo*, 59 Misc.2d 750 at p. 765, 300 N.Y.S.2d 459 at p. 464 (Sup. Ct. 1969).

In the same vein, in *People* vs. *McClain*, 88 Misc.2d 693, 389 N.Y.S.2d 976 Justice Julius H. discussed the purpose behind these stringent requirement. In Justice Julius opinion he held that a suspect incarcerated on an unrelated charge cannot be made to stand in a lineup unless he/ or she have been given proper "Notice" in an application spelling out Probable Cause for granting of the relief sought.

Supplement for Appellant with Attached Exhibits

See e.g., Matter of Walter Pidgeon v. *Rubin*, 80 A.D.2d 568, 435 N.Y.S.2d 763 at p. __, (1982).

Relying also on the principles stated in *Kirby* v. *Illinosis*, 406 U.S. 682 at p. 688, 92 S.Ct. 411 (1972), where the U.S. Supreme Court ruled after the accused has been formally charged by indictment, information or complaint, his Sixth and Fourteenth amendment right to Counsel will have attached, and a lineup conducted without notice to and in absence of Counsel will be held to violate that right. The Supreme Court further held that the "target" of an application is entitled to "Notice" and the opportunity to be heard on the all-important issue of Probable Cause and that an accused is entitled to Counsel to assist him in his opposition, in what by its very nature is an "adversary judicial proceeding." *Kirby*, supra, at 1881, 92 S.Ct. 1872.

In sum, where a lineup identification followed an individual's illegal arrest, the evidence of that tainted identification must be suppressed. Cf., *People* v. *Dodt*, 61 N.Y.2d 408 at p. __, 474 N.Y.S.2d 441 (1984) (lineup); accord *People* v. *Young*, 55 N.Y.2d 419 at p. 430-1, 449 N.Y.S.2d 701 (1982). Appellant further contends that the above authority and supported rationale controls the problem in the case at bar, therefore, the lineup testimony by the prosecution witness under indictment 2119#91 should be suppressed in accordance with all identification evidence under IND. NO. 2120#91 in absent of adequate notice to appellant (then) retained Counsel of the pending lineups and a lack of Probable Cause to arrest appellant for each separate charge.

Supplement for Appellant with Attached Exhibits

Based on the foregoing, the Judgments must be set-aside and a new trial declared, as well as IND. NO.: 6542#89 in the interest of justice.

POINT II

APPELLANT WAS ENTITLED TO COUNSEL AT ALL CRITICAL STAGES OF THE CRIMINAL PROSECUTION, WHICH ATTACHED WHEN LINEUP ORDER WAS FILED (U.S.C.A. Const. Amends. 5, 6 and 14; Const. art. I Sec. 6.).

It is firmly established in our jurisprudence that an accused is entitled to Counsel at all critical stages of the criminal proceeding *see, e.g., People* v. *Settle*, 46 N.Y.2d 154, 165, 412 N.Y.S.2d 874, 880, 385 N.E.2d 612, 617 (1978). The right to Counsel attaches of course, once the criminal action has been commenced. *See, e.g. People* vs. *Blake*, 35 N.Y.2d 331, 339-340, 361 N.Y.S.2d 881, 890-891, 320 N.E.2d 625, 631-632. But it may also attached at an earlier activity. For instance, a Court order permitting the Police to bring the defendant to the scene of the crime, *see People* v. *Sugden*, 35 N.Y.2d 453, at p. 461, 363 N.Y.S.2d 923, at p. 929, 323 N.E.2d 169, at p. 173, or directing that an accused appear in a lineup, *see*, also *People* v. *Coleman*, 43 N.Y.2d 222, 401 N.Y.S.2d 57, 371 N.E.2d 819 are sufficient to trigger the right to Counsel even though the criminal action may not have commenced.

Thus in this case, appellant's right to Counsel attached when the order to show cause was filed for future lineups entitling appellant to the services of his retained Counsel

accord *Blake*, supra, 35 N.Y.2d 331 at 339; *People* v. *Sugden*, 35 N.Y.2d 453, at p. 461, which address the legal error committed against appellant. Appellant case is also similar to *People* v. *Coleman* (supra), *Coleman* had been placed in Court ordered lineups without the right to his Counsel. The Court of Appeal had later corrected this similar error by holding that the right to Counsel had "indelibly attached". Here, violation greater than *Coleman* existed.

The appellant argue that *Blake*, *Settle*, and *Coleman* control his case because the issuance of the arrest warrant in connection with the order to show cause commencing the criminal action which the appellant were suppose to answer in Court and once a matter is the subject of a legal controversy any discussion relating thereto should be conducted by an accused Counsel: at that point Counsel is in a position to safeguard his client's right. Credit *Settles*, supra, at p. 163-164, 46 N.Y.2d __. Appellant argues on that his Counsel position were known to the law enforcement in Queens and that the insufficient explained delayed which prevented appellant the services of his Counsel. In this case the right to Counsel was deliberately block, the breach of which said lineup(s) should result in exclusion.

Accordingly, the lineup evidence under IND. NO. 2119#91 and 2120#91 should now be suppressed and new Trials declared as well as IND. 6542#89 in the interest of justice.

Supplement for Appellant with Attached Exhibits

POINT III

APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHICH THE RESULTING CONVICTION ARE THUS CONSTITUTIONALLY DEFECTIVE AND MUST BE REVERSED

Both the Federal and New York State Constitutions guaranty to the defendant in a criminal proceeding the right to the assistance of competent legal Counsel to assist in his defense. U.S. Const., Amdt. 6, N.Y. Const., Art. 1 Sec. 6. The Court have elucidated this requirement to interpret the mere presence of Counsel as being insufficient compliance with the Constitutional guarantees, and have instead required that a criminal defendant be afforded Counsel who provides effect-assistance. *McMann* v. *Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The performance of trial Counsel may be evaluated by the appellate courts to ensure that Counsel has not failed to render adequate, reasonably effective legal assistance. *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Analysis of the alleged deprivation of his right is based on the Constitution as defined in the Sixth Amendment. *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

The ideals to be applied in assessing the trial performance of a defendant's Counsel have been set forth by the Supreme Court in the Opinion of the Court by Justice O'Conner in the case of *Strickland* v. *Washington*, 466 U.S.

668, 104 S.Ct. 2052, 80 L.Ed.2d 764 (1984). It was the intention of the Court to describe the standards of judging the contention that a conviction must be overturned because of actual prejudice by way of ineffective assistance of Counsel. Id., at 2063. The *Strickland* opinion provide little specific guidance or litmus test of the trial Counsel's adequacy, but while deferring to the individual attorney's decisions of strategy and manner of providing assistance, the Court made clear that the purpose of such analysis is not to examine with hind-sight whether a particular act or omission was unreasonable, but to simply ensure that the defendant received a fair trial. The *Strickland* holding requires that for reversal to be required, it must be shown that the trial Counsel's assistance must have been "deficient . . . [with] errors so serious that Counsel was not functioning as the "Counsel" guaranteed . . . by the Sixth Amendment [and that] the deficient performance prejudiced the defense . . . [i.e.,] that Counsel's errors were so serious as to deprive the defendant of a fair trial . . . whose result is unreliable. Id., at 687. The *Strickland* opinion simply requires a showing that Counsel's representation fell below an objective standard of reasonableness.

In New York, the standard for questions of ineffective representation derive from the opinion of the Court of Appeals in *People* v. *Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 (1981). Even though this decision predates the *Strickland* opinion, the broader protection offered by this decision remain the law in New York.

The Court of Appeals has varied little from this standard, and has continued to assert that hindsight will not benefit an

analysis of Counsel's performance. However, it has been held that such a claim may rest on something other than a specific trial strategy, additional, Counsel unreasonable performance may rest on the cumulative errors of Counsel. *See, e.g. People* v. *Glen W.*, 89 A.D.2d 883, 453 N.Y.S.2d 217 (1982).

A Contention of ineffective assistance — of trial Counsel require proof of less than meaningful representation, rather than simple disagreement with strategies and tactics (*see People* v. *Benn*, 68 N.Y.2d 941; also *People* v. *Rivera*, 71 N.Y.2d 705 at 708 (1988).

While it must be acknowledge that the record of proceedings below presents glaring error of commission or omission by the defense Counsel and events which caused the proceeding and the trial(s) to be a sham, when taken as a whole, the appellant attorney's performance did not provide appellant with the effective, professional assistance to which appellant was entitled.

The *Strickland* Court requires a defendant to show that the resulting conviction was unreliable and unfair, as a result of the errors of trial Counsel. *Strickland*, supra, 8 L.Ed.2d 674, at 687. In describing the scrutiny against which Counsel's performance will be judged, the *Strickland* Court has endorsed the requirement of "reasonable effective assistance" which the Second Circuit has adopted and describe as requiring "that the quality of defense Counsel's representation should be within the range of competence reasonably expected of attorneys in criminal cases". In *Trapnell* v. *United States*, 725 F.2d 1419, (2d. Cir. 1983) this Court has recognized that adequate preparation for trial

often may be a more important element in the effective assistance of Counsel to which a defendant is entitled that the forensic skill exhibit in the Court room. *Stubbs* v. *Thomas*, 590 F.Supp. 94 (S.D.N.Y. 1984). The *Stubbs* Court went so far as to examine the performance of the investigator who was assigned to discover information for the defense, and held that even a deficient performance by the investigator could constitute a deprivation of the defendant Sixth Amendment rights. Id., 100.

The *Baldi*, supra, at 146-147 recognized exceptions to requiring to show that the trial result would have been different when, for example, "Counsel cumulative errors failed to subject the prosecution's case to meaningful adversarial testing" . . . Here, appellant Counsel's behavior and conduct of his duties as effective Counsel was insufficient to meet the *Strickland*, *Baldi* (or any) standard of reasonable, competent professional advocacy.

The appellant will now address the *Strickland* and the test of *Baldi* that is required to warrant a reversal of his conviction(s) due to ineffective assistance appellant trial Counsel conduct at various levels.

A. The Strickland and Baldi Test:

Ineffective Representation

This Court will find that numerous instances establish appellant trial Counsel lack of effective assistance.

To begin with, appellant will first demonstrate Counsel fatal errors under Indictment 6542#89.

Supplement for Appellant with Attached Exhibits

Sandoval Proceeding[1]

(1). Appellant and Counsel had a lack of communication which violated appellant due process based on a lack of communication (SP.: 3, 4, 5, 6, 7, 8, 9).

Jury Selection

(2). At a point during Jury Selection one of the perspective juror (Ms. Krinsky) rendered an objection as to her ability to be an impartial juror for the trial (JS.: 11, 12-19). Some time later the Court, the Assistant District Attorney in the presence of appellant trial Counsel had probed this perspective juror and another unknown juror about their express concern being a member of the Jury Panel (JS.: 40-63). Appellant argues that it was, here, Counsel violated his due process when Counsel failed to object to the Court probing of the perspective juror(s) outside the presence of his client.

(3). During the use of the defense peremptory challenges; Counsel, the Court and the trial prosecutor inside the Court chambers, outside the presence of appellant, conducted the peremptory proceedings. Here, appellant argue that his Counsel failure to render an objection denied him full participation of the selection of his Jury Panel and to be present at every material stage of the trial (J.S.: 13-63-67). Appellant, assert that Counsel should have known that

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1. Transcript pages preceded by "SP." refer to pages of Sandoval minutes [cover dated 1/21, 22, 1992; pages preceded by JS. refer to pages of the Jury Selection [cover page dated 1/23/92].

appellant had an absolute right to participate in the use of his peremptory challenge and that his Counsel failure to respect that right is sharp evidence of his Counsel deficiency.

Trial[2]

(1). Counsel failure to adequately intertwine the opening and closing statements with the facts of the case obstructed the mold, the fair proceeding and process at appellant trial (Tr.: 14-17) (Tr.: 317-349), defense Counsel failed to illuminate the facts of the defense witness Danchak to the jury adds to Counsel errors.

(2). During trial appellant consulted with Counsel to call Police Officer *Danchak* to the stand for his defense based upon which he did, however, Counsel chose not to introduce this defense witness officer *Danchak* grand jury minutes at trial that would have proven officer *Danchak* vehicle was positioned in the "exact" same location on Archer Avenue as Police Officer *Faya* the alleged arresting officer, clearly, contradicted *Faya* testimony. Instead, Counsel allowed the defense witness to commit perjury, nor would he impeach this to correct his false testimony (Tr.: 239-246). Appellant stresses that *Faya* and Officer's *Danchak* testimony was under oath and directly contradicted each other testimony, and that if it had been made plainly available to the jury by Counsel the verdict might well have been different. Counsel failure here was intentional which is sharp evidence of Counsel deficiency.

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2. Transcript pages preceded by "Tr." refer to page of trial minutes [cover dated 1/27, 28, 29, 30, 1992].

Supplement for Appellant with Attached Exhibits

(3). Appellant, further argues that Faya and Danchak's inconsistent arrest testimony furnished proof of an essential element of misidentification; the two issues are inextricably intertwined: if Faya lied about arresting appellant and that Danchak changed his testimony about the arrest, then there exist no proof that either witness Farajian or Kashani bore the requisite independent source at the time of the alleged show-up identification. Appellant frames the issue in this wise: is a prosecutor relieved of his legal and ethical obligation to correct testimony he and defense Counsel knew to be false whenever defense Counsel inexcusably fails to correct the error himself? Appellant stresses that under the circumstances an unfair trial occurred irrespective of who is to blame for it.* Counsel failure here was intentional which is sharp evidence of Counsel deficiency, and/or prejudice.

Moreover, appellant argues that Counsel was ineffective for failure to object to portions of the Court charge with respect to the charge on "identification and resisting arrest without proper instructions to the jury and/or dismissing the indictment before submission to the jury, because the jury may have reasonably concluded that the resisting arresting was conclusive or that the burden of proof shifted to the defendant (Tr.: 382-412). Considering the case and the charge as a whole Counsel should have moved for limiting instructions of Danchak testimony since it related to the elements of the witness(es) identification and that of the fifth element of resisting arrest in. This error renders Counsel actions meaningless.

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* Appellant also submit that the Prosecutor should not be absolved for misleading the jury and the judge (*see*, Grand Jury Min. in support hereof).

Supplement for Appellant with Attached Exhibits

Wade Hearing under IND. No. 2119#91, 2120#91

(1). Counsel failure to call attorney Robert Schwartz who incorrectly represented appellant and another individual on the same day at the lineup(s) hampered appellant right to present factual evidence at the pre-trial hearing to expose any possible suggestivibility which may have been observed by Mr. Schwartz while attending the lineups.

(2). Counsel failed to make out an order to produce the alleged informant for a Darden inquiry on the ground that there were a rational basis to reject Detective Redmond testimony of the alleged informant. (See appellant Exhibit (C) attached thereto in support hereto of).* This error by Counsel is sharp evidence of Counsel deficiency and/or result in prejudice.

Sentences

(1). Appellant will now lists the things Counsel did not do under IND. NO.: 6542/89, 2119#91 and 2120#91 that renders Counsel ineffective:

(2). As to IND. NO. *2120#91*, Counsel made no effort to alert the Court that appellant had a right to withdraw the tainted Alford Plea in that the Court illegal sentenced appellant in connection with a "Count" of the indictment which had been earlier dismissed (i.e. the first Count Robbery in first degree) by the Court and never resubmitted to the Court by the People.

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* See Counsel main brief for Exhibit (C).

Supplement for Appellant with Attached Exhibits

(3). As to IND. NO.: *6542#89, 2119#91 and 2120#91*, Counsel made no valid enough effort to challenge the Constitutionality of appellant previous convictions at either sentence proves Counsel had a lack of interest to present meaningful evidence in his client behalf. *See*, C.P.L. 400.21; *People* v. *Chestnut*, 188 A.D.2d 480.

(4). As to IND. NO.: *2120#91*, appellant further stresses that his right to Counsel was adversely affected when his attorney, either voluntary or at the Court's urging, became a witness against appellant. When the Court deemed it necessary to obtain factual information from Counsel during appellant application to withdraw his plea, the Court should have assigned the appellant different Counsel before doing so. Moreover, once Counsel took a position adverse to appellant, the Court should not have proceeded to determine appellant oral application to withdraw without first assigning the appellant new Counsel in light of the misrepresentation and/or conflict of interest between appellant and Counsel. *See, e.g. People* v. *Satana*, 156 A.D.2d 736, 550 N.Y.S.2d 356 at 358 (controlling).

(5). As to IND. NO. *6542#89, 2119#91* respectively, Counsel made no investigation of obtaining testimony from appellant relatives, friends etc.. For instant, Counsel failed to use statements from appellant Mother or Wife whom were present and willing to testify in appellant's behalf that appellant was not a violent person, but devoted to his family. If Counsel would had used this testimony to humanize appellant, thus counteracted the bad impression of appellant before the Court by presenting some other favorable mitigating circumstances there is a significant chance that appellant would have been given a much lesser sentence.

Supplement for Appellant with Attached Exhibits

In view of the above possibilities, conjoined with the unreasonableness and meaningless of Counsel's cumulative failure(s) are more than sufficient to establish a violation overall. In sum, it must be concluded that appellant conviction(s) must be vacated and new trial(s) declared.

CONCLUSION

BECAUSE OF THIS DEPRIVATION OF APPELLATE CONSTITUTIONAL RIGHTS, THE CONVICTIONS MUST BE REVERSED FOR NEW TRIALS.

s/ Walker, Sherman
SHERMAN WALKER
92A7141 II Appellant
Pro-Se
Elmira CORR. FAC.
Elmira, NY 14902-0500

Supplement for Appellant with Attached Exhibits

EXHIBIT A

SP 0068-91 **PART AA-2**

SUPREME COURT
QUEENS COUNTY
CRIMINAL TERM

The People, etc.,
vs

Defendant
IMO
SHERMAN WALKER

* * *

ATTY.
s/ Robert Schwartz 18B

Adjournments

PART	DATE	REMARKS	PART
AA2	5-22-91	O.S.C. (LINE-UP)	GRAND

Supplement for Appellant with Attached Exhibits

IND. NO. SP0068/91

PEOPLE OF THE STATE OF NEW YORK

vs.

I.M.O.
SHERMAN WALKER

JUDGE VINCENT F. NARO
PART AA2 DATE 3/22/91

NATURE OF PROCEEDING: O.S.C. LINE-UP

* * *

APPEARANCES:

* * *

ROBERT SCHWARTZ Attorney (of counsel) for Defendant

ADJOURNED: Application to conduct lineup is granted after oral argument

3/22/91

- s/ Vincent F. Naro
HON. VINCENT F. NARO

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

SP0068-91

NYSID #5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

ORDER TO SHOW CAUSE

Upon the annexed affirmation of Gary F. Miret, dated March 18, 1991 and the affidavit of Detective James Redmond, Sh. #2970 complaint reports and upon all the proceedings heretofore had herein.

Let Sherman Walker show cause, at Part AA-2, of this Court, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, N.Y. on March 22, 1991 at 9 AM of said day or as soon thereafter as counsel may be heard,

Why an Order should not issue commanding and directing Sherman Walker to appear and participate in a lineup to be conducted by the Office of the District Attorney of Queens County at the 109th Precinct on March 25, 1991 or as soon thereafter as is mutually convenient, and it is hereby

Supplement for Appellant with Attached Exhibits

ORDERED, that the 18B County appointed counsel shall be appointed Counsel for Sherman Walker in the above entitled action and in all related proceedings and matters, and it is further

ORDERED, that counsel submit an Order to Produce Sherman Walker, to this Court no later than March 20, 1991, if counsel believes his presence to be required at the hearing on this matter. Failure of defense counsel to submit an Order to Produce for this Sherman Walker by March 20, 1991 will be deemed by this Court a waiver by counsel of Sherman Walker's presence at this hearing.

Sufficient cause therefore appearing, let service of a copy of this Order, together with the paper which it was granted, upon 18B County appointed counsel the attorney for the Sherman Walker on or before March 18, 1991 be deemed sufficient service.

Dated: Kew Gardens, N.Y.
March 18, 1991

s/ Vincent F. Naro
Justice of the Supreme Court
HON. VINCENT F. NARO

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

NYSID 5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

AFFIRMATION

Gary F. Miret, under penalty of perjury and pursuant to Section 2106 of the C.P.L.R., affirms and says:

1. That I am an Assistant District Attorney of the County of Queens, of counsel to John J. Santucci, District Attorney of Queens County, and that I am in charge of the investigation of this case.

2. That the appearance of the above-named defendant is required in order to conduct a lineup relating to the charges of Robbery for which he is a suspect, said crimes having been committed in Queens County.

3. That probable cause exists to believe that the above-named committed the alleged crime for the following reasons:

Upon information and belief, and based upon information supplied to my office by Detective James Redmond, Sh. #2970, on January 18, 1991, January 24, 1991, January 25, 1991 and February 14, 1991, photographs of the

subject of this investigation Sherman Walker, NYSID #5026622Q were identified to Detective James Redmond, Sh. #2970 by the persons from whom the subject forcibly took property, in Queens County, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990.

Annexed to this application are lettered exhibits. These exhibits are photocopies of official police reports, that establish more fully the circumstances of the incident and the identification.

It is therefore requested that 18B County appointed counsel in Queens be appointed counsel on this case for the subject of this investigation.

4. That the Office of the District Attorney of Queens County is to conduct a lineup at the 109th Precinct on March 25, 1991 between 7:00 – 9:00 p.m.

5. That no prior application has been made for the relief herein prayed for.

WHEREFORE, the People respectfully request that the Court issue an Order commanding and directing the defendant herein to appear and participate in the aforementioned lineup.

Supplement for Appellant with Attached Exhibits

Dated: Kew Gardens, N.Y.
March 18, 1991

Respectfully submitted,

JOHN J. SANTUCCI
DISTRICT ATTORNEY
QUEENS COUNTY

by: s/ Gary F. Miret
Gary F. Miret
Assistant District Attorney

Supplement for Appellant with Attached Exhibits

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM

NYSID #5026622Q

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

STATEMENT IN SUPPORT

STATE OF NEW YORK)

COUNTY OF QUEENS) :ss:

Detective James Redmond, Sh. #2970, being duly sworn deposes and says:

A photograph of subject SHERMAN WALKER, NYSID #5026622Q has been identified to myself as the person who forcibly took property from persons known to myself and the District Attorney's Office, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990 in Queens County, by the persons from whom the property was taken.

Attached to this statement in support are photo copies of official police reports that more fully establish the circumstances of the incident and identification.

Supplement for Appellant with Attached Exhibits

I have read the above statement and swear that it is all true.

All false statements made herein are punishable as a Class "A" Misdemeanor pursuant to Section 210.45 of the New York State Penal Law.

s/ James Redmond
Detective James Redmond,
Sh. #2970

Dated: March 6, 1991

Supplement for Appellant with Attached Exhibits

COMPLAINT

Robbery

160.15

* * *

Actions of Victim Prior to Robbery, Larceny or Sex Crimes:
Working in Store

* * *

37A Living Together?
No

38 Can Identify?
Stranger

39 Comp. Rec'vd:
Radio

Will View Photo?
Yes

Will Prosecute?
Yes

Reporter ☐ Witness ☒

* * *

Supplement for Appellant with Attached Exhibits

Position/Relationship:
Sales person

* * *

Name of Location (Specific):
Jewelry store

40 Address/Location of Occurrence:
28-03 Steinway St.

41 Sec/Post of Occ.:
David

44 Visible by Patrol:
☐ Yes ☒ No

* * *

61 Rep. Ag'cy Code:
N.Y.P.D.

* * *

Case Status:
☒ Open ☐ Closed

Unit Referred To:
114 RIP

* * *

Supplement for Appellant with Attached Exhibits

Quantity	Article	Description – Brand, Model, Serial No.
1	Necklace	T/M Channel setting with herring bone chain and 1½ carat white stones (diamonds) valued at $2800.00
1	Bracelet	T/M (Square) woman's bracelet with 78 points of white stones (diamonds) valued at $2000.00

Property Summary

Item	64	66 Value Stolen
Jewelry	05	$4800.00

* * *

Total No. of Perpetrators:
Wanted 1

Weapon:
☒ Used ☐ Possessed

Describe Weapon (if firearm, give color, make, calibre, type, model, etc.):
Canister of mace

Wanted ☒ Arrested ☐

Supplement for Appellant with Attached Exhibits

Sex:
M

Race:
Blk

* * *

Age:
28-30

Height:
5 ft. 6-7 in.

Weight:
160

* * *

Hair Color:
Black

Hair Length:
Short

* * *

Accent:
West Indian French

* * *

Supplement for Appellant with Attached Exhibits

Clothing Description:
Short black leather jacket, Light blue jeans, black sneakers

* * *

List Additional Victims & Witnesses — (Reconstruct Occurrence including Method of Entry & Escape — include Unique or Unusual Actions:

Complainant present at the 114th Pct., states that at t/p/o, a male Black entered the place of business and pretending to be a customer, asked to see the above described items of jewelry. The male spent approximately 15 to 20 minutes in the store before he produced a small canister of mace and sprayed complainant and witness in face. The perpetrator at this time fled the store with the complainant in pursuit. He ran in the direction of Astoria Blvd., where complainant lost sight of him. [redacted] complained of a burning sensation in [redacted] face at the time of the incident, however, at time of report, [redacted] refused medical aid.

Latest Print Team:
☐ Yes ☒ No

Crime Prevention Survey:
☐ Yes ☒ No

Supplement for Appellant with Attached Exhibits

Complaint Report Prepared By:
CALANTJIS, S.

Title:
POLICE OFFICER

Command:
114 RIP

Name Printed:
CALANTJIS, S.

Tax Registry No.:
879401

Command:
114 RIP

* * *

BOROUGH ROBBERY SQD CASE # 92/91

Supplement for Appellant with Attached Exhibits

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Indictment # *2120/91*

THE PEOPLE OF THE STATE OF NEW YORK,

– against –

SHERMAN WALKER

Defendant,

AFFIRMATION

MICHAEL P. JOSEPH, being duly admitted to practice law in the State of New York, hereby affirms under the penalties of perjury as follows:

1. I represent SHERMAN WALKER in the above encaptioned matter.

2. I previously filed an omnibus motion seeking a variety of relief including the suppression of the identification take took place at a lineup and any in-court identification of the defendant.

3. In my previous affirmation, I set forth relevant facts regarding the lineup that took place in reference to the instant indictment. As stated in said affirmation, the defendant Walker was represented by your affirmant in a case pending

in Queens County at the time that he was placed in the lineup. In spite of this fact, your affirmant was not notified or given an opportunity to appear at said lineup.

4. Based upon the Voluntary Disclosure Form provided herein, it appears that the lineup that took place was compelled by court order. This fact, among others caused the defendant's right to counsel to attach. *People v. Jackson* 74 NY 2d 787.

5. The right to counsel is not satisfied by merely appointing a member of the bar. An accused has the right to have his own attorney representing him at any critical stage. I am informed by my client that he stated at said lineup that he was represented by your affirmant and therefore wanted to be represented at the lineup only by your affirmant.

6. In that I represented Sherman Walker on another pending case, and in that he requested that I be present, I should have been allowed the opportunity to appear as Mr. Walker's counsel at said lineup. *People v. Coates* 74 NY 2d 244.

WHEREFORE, your affirmant prays for the relief sought in the motion previously submitted or for any other relief that this court may deem just and proper.

DATED: May 22, 1991
New York, New York

s/ Michael P. Joseph
MICHAEL P. JOSEPH

Supplement for Appellant with Attached Exhibits

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF *NEW YORK*: Part 78

IND. NO. 338 #91

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

— against —

SHERMAN WALKER,

Defendant

Affidavit in Support of Motion for A New Trial

STATE OF NEW YORK)
County of *New York*) SS.:

I, *Terrence Heywood*, being duly sworn deposes and say that:

I reside at 106 Howard Avenue, Brooklyn, New York 11233.

1. I state that presently I made this affidavit without threat or fear of my liberty in support of Sherman Walker's motion for a new trial.

Supplement for Appellant with Attached Exhibits

2. I state that I do not personally know, Mr. Walker, or have associated with him in the past. However, I do acknowledge attending the same public school with Mr. Walker in the past, and only know we are from the same neighborhood.

3. I state, that I have previously conferred with a member of, Sherman Walker's family with regards to the statements contained in the two Police reports marked as Mr. Walker Exhibit (A) and (B) along with the transcripts of a Wade hearing minutes marked as Mr. Walker Exhibit (c) I believe; for which I am the subject of discussion contained therein.

I further state, I am the subject referred to in the Police interview reports in that the NYSID# 5537997P clearly matches the NYSID# NO. contributed to me.

4. I have been arrested before in the past. Although I have never been arrested by a Detective Frank Favilla, Shield #2048, of the M.T.S., R.I.P. till this present day. I do not personally know Detective Frank Favilla, Shield #2048, nor have I carried out any informant work for any member of the Police Department in the past. In that I am not a confidential informant with a Registered Number that has or have worked for Detective Frank Favilla, Shield #2048, in the past.

5. Further I do not personally know a Detective Redmond, Shield #2970, of Queens' Robbery Squad. Neither have I met with Detective Redmond on Jan. 15, 1991, at the N.Y.C. Correctional Facility, Brooklyn Brig, or informed him of any information of any kind against Mr. Walker in compliance with Detective Frank Favilla, Shield #2048, as indicated in

Supplement for Appellant with Attached Exhibits

Mr. Walker Exhibit (A) and (B), transcribed by Detective Redmond, Shield #2970.

6. I made the above determination when I actually observed the Police reports describing substance of this information. That this information transferred by Detective Frank Favilla, Shield #2048, of the M.T.S. R.I.P. Precinct was false and known by the detective to be false.

7. I swear that the aforementioned facts are true under the penalty of perjury.

Respectfully Submitted

s/ Terrence Heywood
Terrence Heywood

Sworn to before me this
26th day of December, 1992

s/ Pedro Escrogima
PEDRO ESCROGIMA
NOTARY PUBLIC State of New York
No. ____2759
Qualified in New York County
Commission Expires December 31, 1994

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MARCH 18, 1996

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

VINCENT R. BALLETTA, JR., J.P.
CORNELIUS J. O'BRIEN
WILLIAM C. THOMPSON
DAVID S. RITTER, JJ.

92-01662
92-04929

The People, etc.,

respondent,

- v

Sherman Walker,

appellant.

(Ind. Nos. 6542/89 and 2120/91)

DECISION & ORDER

* * *

Decision and Order Dated March 18, 1996

Application by the appellant for a writ of error coram nobis to vacate, on the ground of ineffective assistance of appellate counsel, two decisions and orders of this court, both dated June 12, 1995 (*People v Walker*, __ AD2d __ [Case No. 92-01662]; *People v Walker*, __ AD2d __ [Case No. 92-04929]), affirming two judgments of the Supreme Court, Queens County, rendered February 27, 1992, and June 16, 1992, respectively.

ORDERED that the application is denied.

The appellant has failed to establish that he was denied the effective assistance of appellate counsel (*see, Jones v Barnes*, 463 US 745).

BALLETTA, J.P., O'BRIEN, THOMPSON and RITTER, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 18, 1996

NOTICE OF PETITION, WRIT OF CORAM NOBIS DATED NOVEMBER 24, 1995

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
APPELLATE SECOND DEPT.

QUEENS COUNTY
INDEX NO. 65 42#89, 2120#91

MANHATTAN COUNTY:
IND. NO. 338#91

SHERMAN WALKER

PETITIONER,

– AGAINST –

Legal Aid Society ex rel and its Member(s); Alden T. Lewis Esq; Samuel M. Feldman Esq; District Attorney Office

RESPONDENTS.

NOTICE OF PETITION
WRIT OF CORAM NOBIS

SIRS:

PLEASE TAKE NOTICE, that upon the annexed petition of Sherman Walker, duly sworn to on this 24th day of November, __ 99 and upon the supporting papers included herein and made part thereof to Special Term Part __, of the Supreme Court of the State of New York, to be held at the

courthouse located at 45 Monroe Place, New York, on the __ day of or as soon thereafter as counsel can be heard, for a WRIT OF HABEAS CORPUS, Pursuant to Article 70 of the Civil Practice Laws and Rules.

ORDERING, the release of said Petitioner Sherman Walker, and for such other and further relief as to this court may appear just, proper and equitable.

DATED: November 24, 1995
East Elmhurst, NY 11370

Respectfully submitted,

s/ Walker, Sherman

Notice of Petition, Writ of Coram Nobis

MEMORANDUM

In the instant matter COHEN V. STATE 269 N.Y.S. 2d 498, reads in the pertinent part section 430.30 of the Criminal Procedure Law, reads: "In all other cases, in such counties (within City of New York) when sentence in imprisonment, the commissioner of Correction of such City "must" deliver the defendant to the proper officer in execution of the judgement." The duty to deliver under the statue is clearly imposed on the commissioner of correction of the City of New York.

Petitioner request that this Court to apply the COHEN V. STATE instant matter heretofore and herein, and if the Court finds the imprisonment to be in violation of section 430.30 of the Criminal Procedure Law, ORDER the defendant's release or, place of imprisonment to comply with the provision of law contained in the Criminal Procedure law.

Respectfully submitted,

s/ Walker, Sherman

Notice of Petition, Writ of Coram Nobis

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS
APPELLATE SECOND DEPT.

QUEENS COUNTY
INDEX NO. 6542#89, 2120#91

NEW YORK COUNTY:
338#91

Sherman Walker,

PETITIONER,

– AGAINST –

Legal Aid Society ex rel.; Alden T. Lewis; Samuel M. Feldman;
District Attorney Office

RESPONDENTS.

PETITION IN SUPPORT OF
WRIT OF CORAM NOBIS

TO: SUPREME COURT OF THE STATE OF NEW YORK:
SPECIAL TERM:

Petitioner Sherman Walker respectfully states:

That the respondents violated certain rights guaranteed under the New York Constitution by harming the Petitioner by means of delayed imprisonment, malpractice, negligent,

nominal misrepresentation by permitting a pattern of illegal procedures and illegal treatment and abuse which was known to them or should have been known to them under Law.

JURISDICTION

This action is brought pursuant to a writ of coram nobis on the grounds that the circumstances surrounding, the misrepresentation and obstruction of petitioners' (Appeal) warrants custody under the 1st, 4th, 5th, 6th, 8th and 14th Amendment of the Constitution. Petitioner, further invokes the pendant jurisdiction of this Court to hear and decide his claim arising out of state law.

PARTIES INVOLVED

(1). Petitioner, at all times herein, is a citizen of the United States and a resident of Kings County, City of New York.

(2). The Respondent(s), Legal Aid Society, 15 Park Row, New York, N.Y. 10038, was and still is a division of and/or municipal corpor. agency existing in New York under said Laws.

(3). Respondents, Philip L. Weinstein Esq, James Branden Esq, Joel Atlas, Hillard Wiese Esq, and chief member(s) are all owner(s) of and in possession of exclusive control of certain premis(es) at the Legal Aid Society these respondents handle criminal Appeals as of Right.

(4). Respondents, Alden T. Lewis and Samuel M. Feldman were and still are the perspective owner(s) and or Partners

of the Law Office at (527) Quincy Street Brooklyn N.Y. 11221; Law Office of (350) Broadway N.Y. 10013 each respectively. Each firm are operated by the member under the existing Laws of the State.

(5). At all time herein, the Respondent District Attorney Office in Manhattan and Queens County were in charge of function in prosecuting Petitioner Appeals herein out.

Upon information and belief, each respondent were acting in their official capacity and each of them acted in the furtherance of their own interest against the Petitioner rights.

* * * * * * * *

Petitioner, humbly urges this Court to conduct investigative action into the background of his Complaint and grant me Counsel to assist him at each and every stage of the proceeding, that the Court may give due consideration to Petitioner claim.

STATEMENT OF CLAIM AND FACTS

James M. Branden, an attorney associated with Philip Weinstein, Esq. whom were assigned by order of the Appellate Division First Department dated __ day of MAY, 1993, to represent the Petitioner of his appeal(s) from a Judgment of the Supreme Court, New York County, under IND. 338#91 rendered on Feb. 13, 1992, convicting Petitioner after a Jury trial of robbery in the First degree [P.L. 160.15] and robbery in the Second degree [P.L. 160.10]

and sentencing thereon (Uviller, J. at trial and sentence). Petitioner's state appeal was denied by the App. Div. Dept., 3 day of OCT., 1995. The motion for leave to appeal Court of Appeal was denied on __ day of _____ (see, Exhibit (A) enclosed herein). Additionally, Phillip L. Weinstein, was assigned to represent Petitioner on his appeals of a Judgment of the Supreme Court Queens County, under indictment NO. 6542#89 rendered on __ day of FEB., 1993, convicting Petitioner after a Jury trial of robbery in the Second degree [P.L. 160.10] and Sentencing him thereon (Beerman, J, at trial and sentence) and Philip Weinstein, Esq. was assigned to represent Petitioner on his appeal of a County, under IND. NO. 2120#91, rendered on __ day of June, 1992. Upon an Alford plea to robbery in the Second degree [P.L. 160.10] to run concurrent with IND. NO. 6542#89 (Beerman, J. at plea and sentence). Petitioner state appeal was denied by the App. Div. Second Dept. on 12 day of June, 1995. The motion for leave to Appeal to the Court of Appeals was denied on __ day of _____, 199__. (*See* Exhibit (A) enclosed hereinto).

Petitioner, states that the respondent(s) were all made full aware with these proceeding in these case(s) and have supposely willfully neglected to examine the record below as to the allege "informant" in question as he did not create an alleged conflict of interest concerning this appeal herein:

After a Wade hearing, but prior to trial on one of the Queen(s) County charges, Petitioner, trial Counsel had received additional *Rosario* material. From one of the documents turned-over it was learned that detective Jame Redmond Sh #2970 the arresting Officer in the Queens

County charge had alleging spoke with a so-called informant, who allegingly happened to be represented by Legal Aid Society at the time. Trial Counsel stated on record that "upon information and belief, [he] believe[d] [the informant] was the source of the information which led to Petitioner being placed under arrest held for lineup(s) then ultimately to arrest Petitioner. In no material way was these facts investigated by the respondents herein even when Petitioner brought to their attention that no confidential informant had existed as falsely claimed by the detective Redmond. (*See*, Exhibit (B) enclosed hereinto).

Under these circumstance(s), it did not constitute a conflict of interest for James M. Branden, to continue to represent Petitioner on his Appeal p[illegible] and the fact that Legal Aid moved to be relieved under Branden motion this Court did violate Petitioner Right to Appeal Counsel as of right. More the respondent(s) Hillard Wiese, Joel Atlas, Alden T. Lewis, Samuel Feldman all remaining inactive at investigating the background the alleged incriminating source supposely represented by Legal Aid Society obstructed Petitioner from receiving the required representation from the Legal Aid Society (*see*, Exhibit (C) [illegible] herein). On or about May of 1993 this [illegible] Petitioner Appellate right(s) and process.

Despite having advised the Attorney in charge of Legal Aid Society of the Attorney James Branden delinquency at correct, the apparent misrepresentation, for the remainder of the appeal, Legal Aid never moved to checked into their client information that shedded light on the non-conflict of interest issue, nor removed Branden and re-assigned new

appellate Counsel to represent Walker's appeal (i.e. their failure to do so denied Petitioner his right to Counsel on appeal). The two 18B appointed should not have been assigned to represent Walker at all on Appeal. Since Petitioner's appeal was actually heard, and since he was misrepresented by Counsel's not assigned as of (right) on his appeal, the prejudice Walker suffered from this neglect deprived him of a fundamental constitutional right to obtain a fair review of his conviction while being properly represented by Legal Aid when their obligation attached upon initial assignment.

Petitioner, argues he is entitled to release, alternatively, a new trial(s because this delayed "nominal misrepresentation" of Petitioner appeal cannot cure the per se due process violation and resulting prejudice of his deprived right to Counsel, under Professional Responsibility. DR5-105(A, C). Specifically, Legal Aid acted contrary to the provisions of Rule DR5-105(C) and to extent in DR5-105(A), as well under the Law.

PREJUDICE CRITERIA ASSERTED TO WARRANT HABEAS RELIEF FOR RELEASE OR NEW TRIAL.

First, the length of the delayed nominal misrepresentation was clearly prejudice; Petitioner appeal was not routine and was actually perfected within the required period of time by his original assigned attorney as of right. Second, no acceptable reason for their misrepresentation can be justified as to why the allege conflict of interest claim thoroughly existed; in that the appointed Legal Aid Society had neglected to monitor Branden critical legal steps taken in Petitioner

case. Third, Petitioner assert that prejudice was felt because he did not waive his right to appeal and to be represented by his Counsel as of right; instead Petitioner repeated efforts to alert Legal Aid went in vain. Finally, prejudice can be seen because of each attorney (18-B) appointed Counsel poor quality of work undermined the out-come of this Appeal and that Petitioner labored under a conflict of interest during this period (*see*, e.g. *ELCOCK* v. *HENDERSON*, 28 F.3d 276 (.2nd Cir. 1994). In light of these circumstances, this neglect to correct the problem prejudice Petitioner to due process right to a speedy appeal and to be represented by his Counsel as of right. Canon 9 A.B.A. Code of Professional Responsibility DR5-105(A, C).

* * * * * *

(6). Petitioner believe he did substantiate his complaint that his right to appeal had been violated by inattention and time consuming procedures frustrated Petitioner's due process right (*Robertson* v. *State of Connecticut*, 501 F.2d 305, 309-10 (.2d Cir. 1974), include only the length of delay suffered by Petitioner but also the respondent's lack of legitimate reason for it. Petitioner repeated assertion of his right to a speedy representation of his appeal which he was due. *Baker* v. *Wingo*, 407 U.S. 514, 530-33, 92 S.Ct. 2182 (1972), by assigned Counsel of Legal Aid Society as of right.

(7). This court make whatever ORDER is required for the [illegible] Prosecution is ORDER to Facilitates the Administration of Justice sought herein, as the court may deem just and proper.

Notice of Petition, Writ of Coram Nobis

DATED: November 24 1995
East Elmhurst, NY 11370

Respectfully submitted,

s/ Walker, Sherman
Mr. Walker Pro Se
14-14 Hazen St.
East Elmhurst, N.Y. 11370
[8959502756 3bk]

Sworn to before me this
24 day of November 199__

s/ [illegible]
COMMISSIONER OF DEEDS/NOTARY

**Please Note My Address*
May be Subject to Change.

AFFIRMATION IN OPPOSITION TO DEFENDANT'S APPLICATION FOR A WRIT OF ERROR *CORAM NOBIS* DATED FEBRUARY 8, 1996

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County Indictment Numbers
6542/89, 2120/91
AD Nos. 93-05226; 93-05228

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant

AFFIRMATION IN OPPOSITION TO DEFENDANT'S APPLICATION FOR A WRIT OF ERROR *CORAM NOBIS*

ROBERT KATZMAN, an attorney admitted to practice in the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendant's application for a writ of error *coram nobis*. I make the statements in this affirmation upon information and belief,

based upon my review of the records and files of the Queens County District Attorney's Office.

2. Defendant was convicted by a jury trial on February 27, 1992, in the Supreme Court, Criminal Term (Beerman, J.) of Robbery in the Second Degree and was sentenced to seven to fourteen years imprisonment under Indictment number 6542/89. On June 6, 1992, defendant was sentenced to seven to fourteen years imprisonment after pleading guilty to Robbery in the First Degree under Indictment Number 2120/91 (Beerman, J.).

3. Defendant has twice moved in the court below to have his judgment of conviction vacated pursuant to C.P.L. § 440.10. These motions were denied on February 8, 1993 and June 28, 1993, respectively (Finnegan, J.).

4. Following defendant's conviction, the Legal Aid Society was appointed to represent him on his appeal. The Legal Aid Society, however, filed a motion to be relieved of the assignment claiming a conflict of interest; the People filed a motion in opposition to Legal Aid's motion. Defendant did not oppose the Legal Aid Society's request to be relieved. This Court granted Legal Aid's Motion on May 12, 1993 and assigned Alden T. Lewis as counsel for defendant.

5. Defendant's writ of error coram nobis, which claims that the Legal Aid Society should not have been relieved as assigned counsel on defendant's direct appeal, should be denied. As a threshold matter, defendant's claim that the Legal Aid Society should not have been relieved is untimely.

Affirmation in Opposition

Had defendant wished to oppose the motion to be relieved, he could have done so at the time the motion was made. Indeed, the People opposed the motion. This Court decided the motion after careful consideration of the basis asserted by the Legal Aid Society — an alleged conflict of interest — and defendant cannot reopen the issue in an application for a writ of error *coram nobis*.

Defendant misconstrues the purposes and the limitations of the writ of error *coram nobis*. Indeed, defendant's current application makes no clear claim of ineffectiveness of appellate counsel. To the degree that defendant asserts that a claim should have been made on his direct appeal regarding the confidential informant's role in defendant's arrest, and it is not even clear from his motion papers that he does so, the brief filed by Alden T. Lewis, defendant's appellate counsel, properly raised such a claim, as noted by Mr. Lewis in his affirmation of January 26, 1996, submitted to this Court in response to defendant's current application. As explained by Mr. Lewis, he raised an issue on appeal regarding the prosecution's purported failure to disclose the informant's identity and the trial court's refusal to reopen the *Wade* Hearing based upon the discovery of the informant. Notably, these claims were made only with respect to indictment 2120/91. Mr. Lewis properly concluded that the confidential informant had no relevancy to defendant's other conviction, under Indictment 65421/89.

Defendant does not, in any way, contend that counsel's presentation of these issues on direct appeal was defective. Indeed, to the extent that his motion can be read as making an ineffectiveness of counsel claim, it asserts only that

counsel should have argued that there was no basis for the Legal Aid Society's request to be relieved as there was no conflict of interest. But this would not have been a proper claim to raise on direct appeal.

A criminal defendant is afforded the constitutional right to the effective assistance of counsel on any appeal granted him as a matter of right. *Douglass v. California*, 372 U.S. 353, 357-358 (1963) (announcing principle, based on equal protection clause). Because New York State, by Criminal Procedure Law § 450.10(1), does grant a criminal defendant an initial appeal as of right to an intermediate appellate court, its statute implicates the constitutional principles announced in *Douglass*, and requires that a defendant on that initial appeal receive the assistance of counsel. That assistance is subject to the usual constitutional scrutiny: the assistance afforded a defendant in such instances must be effective assistance. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (requiring the effective assistance of counsel in any appeal granted defendant as a matter of right); *People v. Ramos*, 108 A.D.2d 209, 210-211 (2d Dept. 1985) (accurately stating principle, though erroneously delegating trial court as the appropriate forum for litigating question of appellate counsel's effectiveness). The Court of Appeals, in *People v. Bachert*, 69 N.Y.2d 593, 599 (1987), ultimately determined that the proper forum for such relief lay in the intermediate appellate court, when the alleged ineffectiveness had earlier occurred in that forum. Therefore, an ineffectiveness of appellate counsel would be properly brought before this Court.

But appellate counsel need not raise all issues or even all meritorious issues — suggested to him by his client, to

meet the constitutional standard of effective assistance. Hence, in *Jones v. Barnes*, 463 U.S. 745 (1983), the Supreme Court held that an appellate attorney did not violate his client's Sixth Amendment rights when counsel refused to prepare a brief raising all of the issues that his client had directed him to address.

Nevertheless, to succeed, a claim of ineffective assistance of appellate counsel must demonstrate true ineffectiveness, rather than mere disagreement. *People v. Benn*, 68 N.Y.2d 941 (1986). Defendant has failed to raised any issue to demonstrate any true ineffectiveness of appellate counsel. In addition, an examination of the appellate brief filed on defendant's behalf reveals counsel's professional representation of defendant did not fall below the minimal requirement that counsel provide "meaningful representation," as of the time of the representation, *People v. Baldi*, 54 N.Y.2d 137, 147 (1981), to meet the New York standard. Furthermore, counsel provided "objectively reasonable representation," to meet the federal standard. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

As noted above, there would have been no legitimate basis for appellate counsel to contend on direct appeal that the Legal Aid Society had been improperly relieved as defendant's assigned counsel. This Court had already considered that issue in that it granted the Legal Aid Society's motion to be relieved, over the People's opposition, and appellate counsel could not have re-argued that issue, on direct appeal. That being the case, defendant has no basis now to claim that appellate counsel was ineffective for failing to raise the issue on direct appeal. Additionally, as shown

above, appellate counsel did raise on direct appeal two legitimate issues concerning the confidential informant's role in defendant's conviction under Indictment 2120/91. Defendant makes no showing that appellate counsel's treatment of those claims was defective in any manner. Consequently, his current assertion that appellate counsel was somehow ineffective has no basis in fact or law.

Therefore, for the above stated reasons defendant's motion should be denied.

Dated: Kew Gardens, NY
February 8, 1996

s/ Robert Katzman
ROBERT KATZMAN
Assistant District Attorney
(718) 286-5840

To: Sherman Walker
92-A-7141
Box 500
Elmira, NY 74902

OPINION OF THE COURT OF APPEALS OF NEW YORK DATED AND DECIDED SEPTEMBER 26, 1995

COURT OF APPEALS OF NEW YORK

Mo. No. 931

In the Matter of Sherman Walker,

Appellant,

v.

Lawrence J. Finnegan, &c., et al.,

Respondents.

* * *

September 26, 1995, Decided

OPINION:

Motion for leave to appeal &c. denied.

VERIFIED PETITION FILED WITH COURT OF APPEALS OF THE STATE OF NEW YORK DATED JUNE 13, 1995

COURT OF APPEALS OF THE
STATE OF NEW YORK

Ind. No.: 6542#89, 2119#91, 2120#91

In the Matter of the application of
Sherman Walker,

Petitioner

FOR A JUDGMENT PURSUANT TO ARTICLE (78)
IN THE FORM OF MANDAMUS

vs.

Justice Finnigan ex rel.,

Respondent.

Verified Petition

I, Sherman Walker, the above named Petitioner duly deposes and says:

I hereby respectfully move this Court pursuant to (C.P.L.R.) 5601 sec. subd. (A) para. (ii); (b) para. (1) and (2); (C.P.L.R.) 7801-4 that this case involves a serious question of constitutional error(s) which ought to be reviewed by this Court based on the Appellate Division Second Department adverse order entered Jan. 17, 1995, denying

Verified Petition Dated June 13, 1995

Petitioner's application for Mandamus relief and Petitioner takes leave to this Court in the interests of justice as well. (*See*, copy of order attached to Appendix).

QUESTION PRESENTED

That the Appellate Division Second Department review of Petitioner Mandamus were rendered an abuse of discretion as a matter of law in that the trial Court failed to compel the determination of Petition's Motion submitted there to vacate certain Judgments in light of the People's failure to respond to Petitioner's Motion pursuant to (C.P.L.) 440.10 and 440.30, U.S.C.A. CONST. Amend. 14; N.Y. Const. Art. I, sec. 6.

STATEMENT OF THE CASE

Petitioner's contention is repeated in this proceeding namely that: he had an absolute due process right to have had his motion to reargue and a Motion for Summary Judgment relief granted in the lower trial court, and that the Appellate Division Second Department while reviewing petitioner Mandamus motion unfairly refused to act against the lower court for their deliberate failure to enforce the C.P.L. statutory requirement under (C.P.L.) 440.10 and 440.30 in favor to petitioner, especially when as here, the District Attorney Office did "NOT" respond at all to the Motion that had been pending before the trial Court, nor had the trial Court exercised its option to grant said Motion in light of the people's failure to respond. The trial Court was constitutionally obliged to follow the statutory language under (C.P.L.) 440.30(1)(7). In fact, the people in response

to Petitioner Mandamus had conceded in their Petition that they "NEVER" actually served a response against the then pending 440.10 motion. (*See*, e.g. the respondent's response to the Petitioner Mandamus at pages 2-3 in their brief). Furthermore, it was injudicious for the Appellate Div. 2d Dept. to indicate in their Court order to the effect that, "We note the motion to reargue has been decided," which this Court can find this statement by the Appellate Div. 2d. Department were "totally" unsupported by the proceeding paper(s) that had went before the lower trial Court as well as the record presented to the App. Div. 2d Dept., therefore, petitioner respectfully submit that pursuant to (C.P.L.R.) article (78) in the nature of Mandamus, inter alia, his motion to compel the people to act on petitioner's motion to vacate certain Judgments is reviewable by this Court to determine whether the App. Div. 2d Dept. were very unfair in its evaluation constituted an abuse of discretion as a matter of Law. Finally, this Court must under the existing (State) Laws correct the intermediate Court analysis, because there were no justifiable reason why the lower Court did not act according to the dictates of the statute under C.P.L. 440.10 and 440.30, when Petitioner demonstrated a clear legal right for the relief sought before the Appellate Div. 2d.

Accordingly, petitioner Motion should be granted relief therein throughout.

Verified Petition Dated June 13, 1995

Argument In support Of Granting Mandamus.

I. Appellate Division Second Department Was A Conflict with the prior decision of this Court.

First, the App. Div. 2d Dept. reliance upon the *Matter of Legal Aid Society of Sullivan Co.* vs. *Sheinmen*, 53 N.Y.2d 12 at p. 16 were inappropriate to justify the denial of petitioner's motion and were wrongfully interpreted against him. In the present situation before this Court there was "NO" other way for Petitioner to obtain full judicial review of his claim that was pending before the trial Court.

While Collateral proceedings in a criminal matter are disfavored (e.g. *Matter of State of New York* vs. *King*, 36 N.Y.2d 59, 364 N.Y.S.2d 879, 324 N.E.2d 351) it is elementary that, where a duty is merely ministerial, mandamus lies (*See*, *Artis* v. *Keegan*, 77 Misc.2d 638, 354 N.Y.S.2d 504; McKinney's Cons. Laws of N.Y., book 7B, C.P.L.R. 7801, C. 7801:9 page 38). That is the case in this instance.

The constitutional question arises in the context of the Petitioner's (C.P.L.) 440.10 and 440.30 information lodged against the People in the County of Queens went unanswered. At the threshold, the appellate Court lost cite of the fact that the respondent in their response to Petitioner's Mandamus in paragraph (6) indicated that the trial Court denied the petitioner's motion to vacate certain Judgment of conviction in an "oral" decision at the bench (respondent affirmation at page 2), in lack of compliance with the statutory requirements. The Court did not receive a written response

from the opposing party against Petitioner 440.10 Motion and by not issuing a written decision after both parties submission papers became final in the matter, the trial Court alleged oral decision denying petitioner motion was in direct violation of the statutory pulsory due process requirement afforded by the statute. (*See* C.P.L. 440.30(5), (7)). Therefore, the Appellate Div. 2nd. Dept. mischaracterize these circumstances when they had "ruled" against petitioner that the (C.P.L.) 440.10 motion were decided in the trial. Even assuming for the sake of argument the lower Court was right when it decided upon the Petitioner's motion orally without first receiving a written response from the People's position, the statutory language forbids this kind of actions to be taken by the trial Court while deciding over (C.P.L.) 440.10 proceeding. (*See* C.P.L. 440.30(7)(3)).

In an effort to meet the rigorous requirements for a writ of Mandamus, Petitioner argues first, that the lower Court by not ordering the respondents to return a written response against petitioner motion, or, alternatively, set down an evidentiary hearing nor file its own written decision on the Law and facts the Court then exceeded its statutory authority and second, that the lack of compliance with the statutory dictates in (C.P.L.) 440.10 and 440.30 denied Petitioner his Constitutional rights and was an abuse of discretion as a Matter of Law.

CONCLUSIONS

The Appellate Division Second Department Judgment should be reversed, and proceeding reinstated in a proceeding pursuant to (C.P.L.R.) (78) to compel the lower Court to

comply with Criminal Procedure Law Sec. 440.10 and 440.30 and striking the Appellate Division Second Department Contrary finding.

Respectfully yours,

s/ Walker, Sherman
Mr. Walker (Pro Se)
Drawer B
Stormville, N.Y. 12582
[92A7141 220]

SWORN TO BEFORE ME
on 13 day of June, 1995.
Notary Public

s/ Paul W. Sargent
PAUL W. SARGENT
Notary Public, State of New York
No. 01SA5037628

DECISION AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED JANUARY 17, 1995

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

SONDRA MILLER, J.P.
CHARLES B. LAWRENCE
DAVID S. RITTER
VINCENT PIZZUTO, JJ.

94-09943

In the Matter of Sherman Walker,

petitioner,

v

Lawrence J. Finnegan, etc., et al.,

respondents.

DECISION & JUDGMENT

* * *

Proceeding pursuant to CPLR article 78 in the nature of mandamus, *inter alia*, to compel the determination of the petitioner's motion to reargue a motion to vacate certain judgments.

Decision and Judgment Dated January 17, 1995

Upon the petition and papers filed in support of the proceeding, and the papers filed in opposition thereto, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs or disbursements.

The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act, and only when there exists a clear legal right to the relief sought (*see, Matter of Legal Aid Society of Sullivan County v. Scheinman,* 53 NY2d 12, 16). The petitioner here has failed to demonstrate a clear legal right to the relief sought.

We note that the motion to reargue has been decided.

MILLER, J.P., LAWRENCE, RITTER and PIZZUTO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

January 17, 1995

COVER SHEET OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED NOVEMBER 15, 1994 AND ARTICLE 78 MOTION

APPELLATE DIVISION
SUPREME COURT OF THE STATE OF NEW YORK
SECOND JUDICIAL DEPARTMENT
45 MONROE PLACE
BROOKLYN, N. Y. 11201

MARTIN H. BROWNSTEIN
CLERK OF THE COURT

ARNOLD EDMAN
MEL E. HARRIS
DEPUTY CLERKS

November 15, 1994

Sherman Walker
92A7141
Box 500
Elmira, NY 14902

RE: 94-09943
Mtr. of Sherman v Finnegan
Orig. Proceed WALKER

Dear Sir/Madam:

We have received your application for the following relief: FOR AN ORDER UNDER ARTICLE 78 IN THE NATURE OF A WRIT OF MANDAMUS.

Cover Sheet and Article 78 Motion

The application will be placed on the motion calendar for 12/2/94

Yours truly,

CLERK'S OFFICE

NOTICE TO: Attorney General NYC &
Richard Brown w/papers

Dear Sir/Madam:

The above mentioned application will be placed on the motion calendar for 12/2/94. On or before that date, please furnish the Motion Clerk with an affidavit expressing your views in this matter.

Yours truly,

CLERK'S OFFICE

Cover Sheet and Article 78 Motion

In the name of Allah, Most High

Mr. Sherman Walker
Elmira CORR. FAC.
Elmira, NY 14902

Dated: 25 day of Oct. 1994.

Appellate Division 2nd. Dept.
Supreme Court
B'klyn., NY 11415

Re: Pro-Se Mandamus Motion
Ind. No. 6542/89, 2119/91 and 2120/91

Dear Court Clerk:

Please find enclosed is the Article (78) motion in the form of Mandamus and Prohibition, for relief in connection with the above indictments number.

Please forward my Motion to a Justice of this Court for a determination and decision.

Thank you much.

Respectfully,

s/ Walker, Sherman
Mr. Walker — 92A7141-I-1-20

Cover Sheet and Article 78 Motion

[illegible]
the Supreme Court of the State of New York, held in and for the County of Queens at the County Courthouse thereof on the __ day of _____, 199__.

PRESENT:

HON. _____
Justice

Index #

SHERMAN WALKER

Plaintiff,

vs.

Finnigann, Justice and District Attorney Office

Defendant.

ORDER TO SHOW CAUSE

Upon reading and filing the affidavit of SHERMAN WALKER sworn to on the 24th day of Oct., 1994, and upon the Petition and exhibits annexed hereto

Let the defendant or his attorney show cause at an IAS Part ____ of this Court, to be held at the Courthouse,

Cover Sheet and Article 78 Motion

Brooklyn, New York, 11415, on the __ day of _____, 1994, at ____ o'clock in the ____noon or as soon as counsel may be heard why an order should not be made

Mandamus and Prohibition relief as well

SUFFICIENT CAUSE APPEARING THEREFOR, let Personal service of a copy of this order, the summons and the papers upon which this order is granted upon the defendant on or before the __ day of _____, 199__ be deemed good and sufficient.

ENTER

_____

J.S.C.

Cover Sheet and Article 78 Motion

APPELLATE DIVISION : SECOND DEPARTMENT

Queens County Ind. No.: 6542#89, 2119#91, 2120#91
AD #: 93-0522

In the Matter of the Application of
Sherman Walker,

Petitioner,

For a Judgment pursuant to Article (78), (22) of the
Civil Practice Law and Rules

vs.

Justice Finnigan, of the Queens County, Crim. Court,
Part K-9; Ass't Dist. Attorney John Doe,

Respondent(s).

VERIFIED PETITION

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Petitioner of *Sherman Walker* respectfully alleges that:

(1). This is a special proceeding brought pursuant to Article (78) C.P.L.R..

(2). Pursuant to C.P.L.R. (Sec.) 7801, 7804-5 and 506(b) venue of this proceeding is in Queens County because that is where the material facts took place.

(3). This Petition challenges: The lower Court failure to grant Petitioner the relief requested in his C.P.L. 440.10 motion dated 28 day of July, 1993, and calendared on 28 day of Sept., 1993. In light of the District Attorney Office continued failure to respond.

PARTIES

(4). Petit., *Sherman Walker*, is a prisoner presently serving an indeterminate term of imprisonment in the State of New York and as such, is in the care and custody of the N.Y.S. Dept. CORR. Ser. at Elmira New York 14902-0500.

(5). *Upon information and belief*, the Respondent Finnigan is a Supreme Court Justice. In that capacity, he is the chief executive Officer of the Court room K-9 and has the statutory authority and responsibility to fairly review Criminal Proc. Law, Penal Law, Motions by Counselors or pro-se litigants pursuant to his judicial function.

(6). *Upon information and belief*, the respondent *John Doe* is an Ass't District Attorney. In that capacity, he/she is assigned to direct or conduct pre-trial hearings, evidentiary hearings and trials and respond to motion paper(s) submitted to the Court against the People of the State of New York.

FACTS

I am fully familiar with all the facts and circumstances surrounding this case as set forth herein based on a thorough review of my records and file.

Cover Sheet and Article 78 Motion

I. THE RESULTS OF STEPS TAKEN ON THE FIRST (C.P.L.) 440.10 MOTION

Petit. had twice moved in the Court below to have his Judgment of Conviction vacated pursuant to C.P.L. 440.10. These Motions were denied on February 8, 1993 and June 28, 1993, respectively (Finnegan, J). (*See*, Exhibit A and B attached).

II. THE LOWER COURT FAILED TO GRANT THE PETIT. C.P.L. 440.10 TO RENEW AND/OR SUMMARY JUDGMENT MOTION

Appellant went back in the Sup. Ct. QRS. Co. on Aug. __, 1993, by way of a motion pursuant to (C.P.L.) 440.10 in accordance with (C.P.L.R.) 2221 to renew based on newly discovered evidence which were supported by an affidavit of a witness name Terrence Heywood (*See*, *Copy* of that Motion attached hereto as Ex. (C).). No new trial or evidentiary hearing was ever held. Consequently, a second motion was filed by way of a summary-judgment. The District Attorney Office did not file an answer at all. (*See Copy* of that motion attached hereto as Ex. (D).). Til this day, the District Attorney's Office have failed to answer any one of these Motions filed with the Court below even when the Clerk of that Court had calendared the renewal motion for the 28 day of Sept., 1993. (*See* Copy of Court notice attached hereto as Exhibit (E)).

Cover Sheet and Article 78 Motion

ARGUMENT

Petitioner alleges that he "*did*" receive notice that the lower Court were in receipt of his Motion to renew (*See* Ex. (E) supra), however, he did *not* receive notice that the people made a determination within the requirement pursuant to (C.P.L.) 440.30(4). Petitioner further alleges that he did not receive notice of an evidentiary hearing nor a new trial which should have been directed by the trial Court in light of the People failure to respond to appellant petition "period".

CAUSE OF ACTION

That Petitioner is entitled to Mandamus and prohibition relief in the present case.

Mandamus is available in the present situation where no adequate remedy exists by way of appeal. Prohibition is available also in that the Petitioner's direct appeal is pending before this Court and should be stayed pending the out-come of this motion (*See*, Copy of Exhibit (f)).

This proceeding was brought to compel Respondent, Justice Finnigan of the Queens County Court to comply with the statutory provisions under (C.P.L.) Art. 440.10 and 440.30, which is outlined in Petitioner's moving papers. (*See* Exhibits attached hereto). It is Petitioner claim that respondent failed to comply with the appropriate (C.P.L.) Art. 440.10 requirements and accordingly Petitioner is entitled to an evidentiary hearing or a new Trial (*See*, C.P.L. 440.30 subd. (5)). Moreover, Petitioner argues that no final

determination took place concerning issues filed before the trial Court until he the (i.e. the aggrieved party) is notified (*see, e.g. Russo* v. *Nassau Community College*, 147 Misc.2d 174, 554 N.Y.S.2d 774 at p. 775).

Furthermore, the petitioner motion to renew were known to the District Attorney Office and the trial Court; the petitioner interest was substantially affected by the act of the respondents and that due process of an actual notice of a final determination should have actually been given by the People. *See, McCann* v. *Scaduto*, 71 N.Y.2d __, 524 N.Y.S.2d 398; (C.P.L.) Article 440.30(4), (5) imposes upon respondent the lower Court the duty "to provide a hearing and/or trial as a matter of right, to any Petitioner's upon such proof in petitioner motion papers stand unchallenged or properly rebutted by the People." *See* (C.P.L.) 440.30(4) Subd. (a), (b) and (c).

No previous application has been made to any Court for the relief requested herein.

WHEREFORE, the appellant/petitioner prays that a judgment under the provision of (C.P.L.R.) Art. (78) 78-4 in Mandamus form C7801:3 at p. 30-1 as well as prohibition in accordance with (C.P.L.R.) 5225 subd. (b); 409 subd. (b); C.P.L.R. 410 be granted:

(1). Remanding this (C.P.L.) 440.10 motion back to the trial Court of Queens County Part K-9 before Justice Finnigan and order that the respondent(s) comply with the statutory provision under (C.P.L.R.) Article 440.10 and C.P.L. 440.30 because of the People failure to act according to the Law.

(2). That this proceeding in connection with the matter of appellate direct appeal presently pending before this Court be and hereby prohibited of further resolution and stayed pursuant to Article 78 in accordance with C.P.L.R. 2201 until due deliberation have been held upon the instant proceeding.

Dated: 24th day of Oct., 1994
ELMIRA, NEW YORK 14902-0500

s/ Walker, Sherman
Petitioner/Appellant
Pro-se #92A7141#I-1-26
Elmira CORR. FAC.
Elmira, NY 14902

to:

Hon. Brownstein, Chief Clerk
App. Div. 2nd. Dept.
45 Monroe Place
B'klyn., NY 11201

AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER UNDER ARTICLE 78 DATED DECEMBER 2, 1994 AND ACCOMPANYING MATERIALS

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County
Indictment numbers
6542/89, 2119/91,
2120/91

AD #s: 93-05226,
92-02880, 92-01662

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Defendant.

Return Date:
December 2, 1994

AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION FOR AN ORDER UNDER ARTICLE 78 IN THE NATURE OF A WRIT OF MANDAMUS

Affirmation in Opposition Dated December 2, 1994

ERIC ROTHSTEIN, an attorney admitted to practice in the courts of the State of New York, affirms the following statements to be true under the penalties of perjury:

1. I am an Assistant District Attorney, of counsel to Richard A. Brown, the District Attorney of Queens County. I am submitting this affirmation in opposition to defendant's motion for an order under Article 78 in the nature of a Writ of Mandamus. I make the statements in this affirmation upon information and belief, based upon my review of the records and files of the Queens County District Attorney's Office, the official court files, and my conversation with Justice Finnegan's law secretary.

2. On February 27, 1992, defendant was convicted after a jury trial of Robbery in the Second Degree and sentenced to seven to fourteen years imprisonment under Indictment Number 6542/89 (Beerman, J). On April 9, 1992, defendant was convicted of Robbery in the Third Degree and sentenced to three and one-half to seven years imprisonment under Indictment Number 2119/91 (Beerman, J). On June 6, 1992, defendant was sentenced to seven to fourteen years imprisonment after pleading guilty to Robbery in the First Degree under Indictment Number 2120/91 (Beerman, J).

3. Defendant has twice moved in the court below to have his judgment of conviction vacated pursuant to C.P.L. § 440.10. These motions were denied on February 8, 1993 and June 28, 1993, respectively (Finnegan, J).

4. On August 9, 1993, defendant filed another motion to vacate his judgment of conviction pursuant to C.P.L.

§ 440.10, alleging new evidence in the form of an affidavit from one Terrence Heywood (*see* Appendix A).

5. On November 29, 1993, defendant moved for summary judgment in the court below based upon the People's failure to respond to his August 9, 1993 motion.

6. Sometime after August 9, 1993, the court below denied defendant's motion to vacate his judgment of conviction in an oral decision issued from the bench.

7. I have searched all three of defendant's appellate files, maintained within the Queens County District Attorney's Office, and I was not able to find copies of the August 9 or November 29, 1993 motions.

8. I have also searched the file cards, maintained by my office, on which defendant's entire appellate history is recorded and can find no mention of August 9 or November 29, 1993 motions.

9. Accordingly, I can only conclude that the defendant failed to serve the People with a copy of his August 9 and November 29, 1993 motions. Significantly, defendant's Affidavit of Service By Mail states that defendant mailed a copy of his August 9, 1993 motion to the court, but it does not list the Queens District Attorney's Office as a recipient (*see* Appendix A).

10. The court below properly denied defendant's August 9, 1993 motion to vacate his judgment of conviction because it was procedurally barred and meritless. Moreover, because

defendant's claims were procedurally barred, the trial court properly denied his motion to vacate the judgment of conviction on its face, and no response in opposition by the People was required.

11. Attached is a Memorandum of Law further showing the propriety of the trial court's denial of defendant's August 9, 1993 motion to vacate judgment.

WHEREFORE, defendant's motion for an order under Article 78 in the Nature of a Writ of Mandamus should be denied.

Dated: Kew Gardens, New York
December 2, 1994

s/ Eric Rothstein
Eric Rothstein
Assistant District Attorney
(718) 286-6602

TO: Sherman Walker
92-A-7141 / B14-23
Box 500
Elmira, New York 14902

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County
Indictment numbers
6542/89, 2119/91,
2120/91

AD #s: 93-05226,
92-02880, 92-01662

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Defendant.

MEMORANDUM OF LAW

Affirmation in Opposition Dated December 2, 1994

POINT ONE

DEFENDANT'S 440 CLAIMS WERE PROCEDURALLY BARRED BECAUSE DEFENDANT FAILED TO RAISE HIS CURRENT CLAIM IN ANY OF HIS TWO PRIOR MOTIONS TO VACATE JUDGMENT.[1]

Although defendant claimed in his motion to vacate judgment that Terrence Heywood's affidavit represents new evidence that merits a new trial, defendant did not raise these claims in any of his two prior motions to vacate judgment. Thus, absent a showing that defendant was not in a position adequately to raise these claims — a showing that defendant did not make — the trial court properly denied defendant's motion to vacate judgment on this ground. *See* C.P.L. §440.10(3)(c). Significantly, Terrence Heywood's affidavit is dated December 26, 1992, a full five months before defendant filed his second motion to vacate the conviction (*see* Appendix A).

---

1. Defendant's claim that the trial court improperly denied his motion to vacate judgment because the prosecution did not file a response in opposition is baseless. First, as shown in the accompanying affirmation, the People were not properly served by defendant with his motion papers; consequently, they cannot be penalized for failing to respond. Second, as shown herein, the claims raised by defendant in his motion to vacate judgment were procedurally barred. That being the case, the trial court was justified in denying defendant's motion on its face — with, or without opposition papers from the People. Criminal Procedure Law § 440.10(3)(a), (b).

Affirmation in Opposition Dated December 2, 1994

Accordingly, this Court should summarily deny defendant's current application.

POINT TWO

DEFENDANT'S 440 CLAIMS WERE PROCEDURALLY BARRED BECAUSE HE UNJUSTIFIABLY FAILED TO PLACE FACTS ON THE RECORD THAT WOULD PERMIT APPELLATE REVIEW OF THE CLAIM.

Defendant's motion to vacate his judgment of conviction, based upon his new evidence claim, was properly denied by the trial court because he could have put facts in support of this claim on the record at trial but unjustifiably failed to do so. Criminal Procedure Law Section 440.10 (3) (a) provides that the court may deny a motion to vacate judgment where the defendant could have, with due diligence, put facts on the record in support of his claim so as to permit appellate review, but unjustifiably failed to do so. Thus, for example, in *People v. Friedgood*, 58 N.Y.2d 467, 471 (1983), the Court of Appeals held that the court properly denied the defendant's motion to vacate the conviction because he failed to show that he used due diligence in trying to adduce, at trial, facts to support his claim that the prosecutor had used allegedly coercive tactics.

Here, although Terrence Heywood's name is listed in the police reports attached to defendant's motion, defendant failed to assert his claim at trial, or in a motion to set aside the verdict, that Heywood was not a confidential informant.

In sum, because defendant failed to place facts on the record to allow appellate review of his claim, the trial court properly denied his claim.

POINT THREE

BECAUSE DEFENDANT KNEW ABOUT TERRENCE HEYWOOD BEFORE TRIAL, HEYWOOD'S AFFIDAVIT DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE.

Defendant knew about Terrence Heywood's existence before trial and thus, Heywood's affidavit did not represent newly discovered evidence within the meaning of C.P.L. § 440.10(g). First, defendant knew about the evidence before trial. Indeed, defendant attached two police reports to his August 9, 1993 motion which delineate Heywood's limited involvement in the case. Furthermore, the fact that Heywood alleges that he never spoke to the police is irrelevant to defendant's case. Indeed, Heywood never testified at either of defendant's trials. How the police came to regard defendant as a suspect had no bearing on his guilt or innocence. Once the police had defendant's name, the eyewitnesses selected his photograph from a series of pictures, thereby providing the necessary probable cause to arrest defendant. Thus, defendant's alleged newly discovered evidence is not material, and there is no possibility that defendant's alleged newly discovered evidence would result in a different verdict at a new trial. *People v. Salemi*, 309 N.Y. 208 (1955); *cert. denied*, 350 U.S. 950 (1956). Accordingly, defendant's motion to vacate judgment was meritless and properly denied.

Affirmation in Opposition Dated December 2, 1994

CONCLUSION

FOR THE AFOREMENTIONED REASONS, THIS COURT SHOULD SUMMARILY DENY DEFENDANT'S CURRENT MOTION.

Dated: Kew Gardens, New York
December 2, 1994

Respectfully submitted,

RICHARD A. BROWN
District Attorney
Queens County

GARY FIDEL
ERIC ROTHSTEIN
Assistant District Attorneys of Counsel

Affirmation in Opposition Dated December 2, 1994

APPENDIX A

REQUEST FOR JUDICIAL INTERVENTION

SUPREME (COUNTY) COURT, QUEENS COUNTY

* * *

FULL TITLE OF ACTION

In the Matter of Application of Sherman Walker,
For a Judgment Pursuant to Article (22)
of the Civil Practice Law & Rules

Plaintiff(s)
Petitioner(s)

– against –

The People of the State of New York

Defendant(s)
Respondent(s)

Name of Assigned Judge:
Hon. Lawrence J. Finnegan

* * *

Affirmation in Opposition Dated December 2, 1994

NATURE OF JUDICIAL INTERVENTION (check)

* * *

_X_ Order of show cause (return date _____)

Relief sought: TO COMPEL JUDGE TO RULE vacate prior order and vacate judgment of conviction

* * *

NATURE OF ACTION OR PROCEEDING (check)

* * *

SPECIAL PROCEEDINGS

* * *

Article (78) reargue/renew CPLR

* * *

In the City of New York only:

_X_ The City of New York is a party to this action.

* * *

Affirmation in Opposition Dated December 2. 1994

Sherman Walker
Attica C.F.
Attica, New York 14011
149 [B&C 92A7141, B-14-28]

Date: Aug 9, 1993.

New York State Supreme Court
Queens County, Crim. Term (K-9)
125-01 Queens BLVD.
KEW GARDENS, New York 11415

Re: CPLR 2221 Reargue/Renew
Motion to Vacate Judgment,
Ind. No. 6542/89, 2120/91, 2119/91

Dear Court Clerk:

Please find enclosed is the appropriate application for an order to show cause and supporting papers.

Please deliver these papers to Hon. LAWRENCE J. FINNEGAN, JR., for consideration.

Thank you.

Respectfully submitted

s/ Sherman Walker
SHERMAN WALKER
Pro-Se — thus far

Affirmation in Opposition Dated December 8, 1994

Enclosures:

Order to Show Cause
Affidavit in Support of Order to Show Cause
Affidavit in Support of Motion to Vacate Judgment
Affidavit of (Terrence Heywood) in Support Thereof
Motion to Proceed as a Poor Person

Affirmation in Opposition Dated December 2, 1994

Present. Hon. _____ Justice

SUPREME COURT OF THE STATE OF NEW YORK

RI#
Index No. _____

In the Matter of the Application of Sherman Walker,

Defendant,

For a judgment pursuant to Art. 22 of the
Civil Practice Law and Rules

— against —

The People of the State of New York

Respondent

Order to show cause granting leave to reargue vacating prior order and vacating judgment of conviction

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The Motion of Sherman Walker respectfully alleges that:

This is a special proceeding brought pursuant to Article (22) of the Civil Practice Law and Rules.

Affirmation in Opposition Dated December 2, 1994

Upon the annexed affidavit of Sherman Walker, Sworn to on the __ day of _____, 199__, and the annexed affidavit in support of order to show cause and the appropriate moving papers, and all the proceeding previously held in regard to this matter the court being satisfied with the truth of the facts alleged and it appearing that the defendant may have good cause of action to vacate judgment of conviction of the Supreme Court of New York State, Queens County and Pursuant to CPLR 2221 for leave to reargue his motion pursuant to Article 440 of the criminal procedure law vacating said order of denial.

Now on motion of the defendant, Sherman Walker, it is

ORDERED, that defendant, Sherman Walker, be permitted to prosecute this proceeding as a person against the people of the State of New York and it is further

ORDERED that Alden T. Lewis, ESQ. be and hereby is assigned to defendant as the attorney whose duty it shall be to conduct said proceeding free of charge to defendant pursuant to CPLR 1101. Whose duty it shall be to conduct oral argument and to conduct an evidentiary hearing and that Pursuant to CPLR 1102, that a copy of the stenographic transcripts of either proceeding be provided to the defendant and assigned counsel, and it is further

ORDERED that the motion be and the same is here by in all respect granted and the leave to reargue defendant's 440.10 motion for vacating the judgment of his conviction be and the same is hereby granted, and it is further

Affirmation in Opposition Dated December 2, 1994

ORDERED that the order of Mr. Justice FINNEGAN, entered and filed in the above entitled action on the 28 day of June, 1993, denying the motion of the defendant for vacating judgment of conviction be and the same is hereby vacated and set aside, and it is further

ORDERED that this proceeding may be commenced by the service by mail and that service of a copy of this order to show cause, together with a copy of the papers upon which it was granted, by mail, upon the District Attorney Office on or before the __ day of _____, 199__, be deemed sufficient service, and it is further

ORDERED that the Clerk of this Court be hereby is directed to make no charge for cost or fees to defendant in connection with the prosecution of this action, and he further be directed to enter the index number and to conform all copies of defendant legal papers in this action, to be served on defendant behalf all necessary copies the order to show cause, affidavit in support of order to show cause to vacate said order and conviction and any or all other documents previously filed in connection with this proceeding by defendant that defendant would otherwise be required to serve upon the District Attorneys Office, and to return a conformed copy of the order to show to defendant, and it is further

Let the Respondents show cause before Motion Term (K9) of the Supreme Court of Queens at the courthouse there of, on the __ day of _____ 199__, at O'clock in the forenoon of that day or as soon thereafter as counsel can be heard why an order vacating the prior order and vacating judgment of

conviction should not be made pursuant to CPLR 2221(9) in accordance with CPL 440.10 granting the (defendant) the relief requested in the sworned annexed affidavit hereto

ENTER.

DATED:

_____

JUSTICE OF THE SUPREME COURT

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS, MOTION TERM (K-9)

RJI #
Index No. _____

In the matter of the application of
Sherman Walker,

defendant,

For a judgment Pursuant to Art. 22 of (CPLR)

— against —

The people of the State of New York,

respondent.

Affidavit in support of order to show cause

STATE OF NEW YORK)
COUNTY OF WYOMING) SS

I Sherman Walker, upon being duly sworn depose and says:

I am the defendant in the above entitled proceedings.

1) I make this affidavit in support of my Motion pursuant to Art. 22 of CPLR and CPL 440 arguing that this court reversed itself and vacate the order made on the 28 day of June, 1993, denying defendant CPL 440.10 motion, that said

order be annulled and that the court rule on the law as defendant has outlined previously in his motions pursuant to CPL 440.10 as such decision was certainly prejudicial to defendant case that is shocking to ones sense of fairness.

2) Defendant is using an order to show cause because he is incarcerated and can not arrange to have a motion personally delivered to the Respondent.

3) Defendant designate Queens County as the place of trial the basis of the VENNE is that Queens County is the judicial district in which the material events took place.

No previous application for the same or similar relief herein prayed for has been made.

Wherefore, your defendant respectfully ask for an order vacating the prior order, and vacating judgment of conviction, and directing respondent, District Attorney Office to show cause why the defendant should not be granted fully, his motion pursuant to 440.10 in accordance with the controlling law outlined in the memorandum of law under Point (A) and (B) in the defendant's motion, and why such other and further relief as may be just and proper should not be granted.

Affirmation in Opposition Dated December 2, 1994

Respectfully submitted

s/ Sherman Walker
Sherman Walker
Attica Corr. Fac.
Attica, N.Y. 14011

Sworn to before me this 28 day
of July, 1993.

Commissioner of Deeds

ROBERT L. BAYLISS
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires April 23, 1994

s/ Robert L. Bayliss

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT STATE OF NEW YORK
COUNTY OF QUEENS, MOTION TERM (K9)

Ind. No. 6542189
2120191
2119191

Sherman Walker,

— against —

The People of the State of New York

Respondent.

Affidavit in support of Motion to Vacate Judgment of conviction and vacate prior order and order a new trial; or an alternative order or hearing with defendant present with the assignment of counsel

STATE OF NEW YORK)
COUNTY OF WYOMING)

Sherman Walker being duly sworn, deposes and says:

1) I am the defendant if the above entitled action and am fully familiar with all the facts and circumstances heretofore had herein.

2) Although I am fully familiar with all the facts hereinafter stated to the best of my knowledge, information and belief, I am a lay person in areas of the law and seek this court's

indulgence for error or fault, pursuant to Sec. 2101(f) of the CPLR of the State of New York.

PROCEDURAL HISTORY

(3) On Jan. 30, 1992, the defendant was convinced after a jury trial of robbery in the Second Degree and sentenced to seven to fourteen years, imprisonment under Ind. No. 6542/89 (Beerman, J.) On June 6, 1992, the defendant was sentenced to seven to fourteen years, imprisonment of acception a sentencing requirement to robbery in the first degree under Ind. No. 2120/91 (Beerman, J.) to run concurrent with Ind. No. 6542/89 with leave to appeal.

(4) On Feb. 8, 1993 the defendant's prior motion to proceed in forma pauperis and to vacate judgment was denied by Justice Finnegan because of the District Attorney office misstatement of facts. (see, order attached as Exhibit (1)). The defendant then renewed his application to vacate judgment on or about May 27, 1993 Based on the following grounds:

POINT A
The prosecutor failed to turn over all prior statements made by a complainant in a timely fashion violated the defendant rights under Rosario and Brady.

POINT B
The defendant was denied effective assistance of counsel because of various grounds to on the record.

(5) Said motion resulted in a decision by Mr. Justice FINNEGAN denying the motion, Thereafter an order denying

the defendant's motion was entered and filed on the 28 day of June 1993. (See copy of order attached as Exhibit (2)).

(6) The defendant now submits this affidavit pursuant to CPLR section 2221 and in accordance with CPL 440.10 for an order vacating the prior order and vacating judgment of conviction with a new trial and suppression hearing in that errors were committed against him under the provisions of Sec. 440.10 Subd. 1 (b), (d), (f), (g) and (h) of New York State Criminal Procedure Law.

BASIS FOR VACATING PRIOR ORDER
AND JUDGMENT OF CONVICTION

(7) That the court over looked certain critical facts and principles of Law previous stated in the defendant motion under Brady and Rosario and that his trial counsel was ineffective.

A) That ADA committed misconduct when he deliberately failed to (timely) inform the court and defense that both identification was tainted in violation of the defendant rights, under Ind. No. 6542/89 and 2120/91.

B) That trial counsel failed to adequately call the court's attention to violation of principles of law and unaddress facts before the court.

The defendant asserts the grounds established in his motion constitute the basis for this court to vacate the prior order is all built around the rule under which an court applies the law as it exist. *See*, CPLR commentary 2221:8 and binding on the court to vacate said order.

Affirmation in Opposition Dated December 2, 1994

Despite the previous determination however, the court should in the interest of justice and the fact that good cause been shown grant the motion. (See CPL 440.30 Subd. (1) and Subd (2), (3), Pat. a,b,c,.

ANALYSIS OF COUNSEL ERRORS UNDER
Ind. No. 6542184, 2120191

(8) I can understand the jury's thinking that I was guilty under Ind. No. 6542/89. I can also understand why the court denied the pre-trial motion under Ind. No. 2120/92 because my trial attorney, Steven Greenfield made no attempt to properly investigate the case.

Mr. Greenfield, who has his office in 12 Melbourne Rd., Great Neck, NY 11021, and was assigned by the court pursuant to 18-B to represent me on or about October 1991.

I first saw Mr. Greenfield, in Oct. 1991, in the "Pens" at the courthouse when he simply introduced himself to me. In Nov. I saw him in court briefly. On a couple of other occasions, when a court appearance was scheduled, I saw him in the pens for no more them five minutes at a time. He was in a hurry all the time and just said "don't worry".

I had other visits in the court pens with Mr. Greenfield during trial times, that lasted about half an hour also. He didn't take notes of what I said then either. He said he would look into matters that need to be investigated soon, that Mr. Greenfield would always be in a rush.

Affirmation in Opposition Dated December 2, 1994

ADDITIONAL ERRORS OF COUNSEL UNDER IND. NO. 2119/91 and SUMMARY STATEMENT

(9) On March 1992 the case was indicated ready for trial before this court under instant indictment.

At the trial held in connection with the instant matter, detective James Redmond, Shield No. 2970 command, Queens robbery squad, testified that he had arrested Mr. Walker and conducted a lineup which Mr. Walker was selected by the complainant and not selected by the witness.

The evidence included: testimony of an eyewitness and complainant witness making the complainant first, testified to his identification made on Mar. 21, 1991 then of the events of the incident. A witness to the alleged incident testified also for the prosecution case that she was unable to identify anyone at the lineup proceeding although there was testimony allowed that she had stated during a photo selection conducted by detective Redmond that Mr. Walker photo only "looked like the suspect".

Based largely upon the foregoing facts, the jury convicted the defendant Walker believing he had committed the crimes of robbery in the third degree and the court dismissed count one robbery in the first degree based on a trial order of dismissal.

****

(10) This affidavit is made both upon personal knowledge and upon information and belief, the source of my knowledge

and basis for my belief being (1) a personal interview I had with Mr. Greenfield, Esq. after the trial which resulted in a judgment of conviction while in the court pen area, Mr. Greenfield told me the acting assistant district attorney by the name of Baptista provided him with two unredacted DD#s reports No. (2) and (3) attached to this affidavit as defendant exhibit (3) of a pretrial interview conducted by Det. Frank Favilla from the M.T.S. pct. and Det. Russo from the 84 R.I.P. in B'klyn, (2) Mr. Greenfield, acknowledged that while this information should have been produced at or prior to trial in that nothing contained therein was confidential, he had only received the unredacted reports in question by a DA, Baptista based on his request of any Rosario and Brady material at trial under Ind. No. 2119/91.

(11) I do remember indicating to Mr. Greenfield that there does seem to be a contradiction in the unredacted DD5 report No. (3) write up in that the indication of the alleged confidential informant now known as Terrence Heywood N.Y.S.#5537997P shows that A.DA McRath improperly withheld the identity and history of the so-called informer.

(12) I had told Mr. Greenfield that this so-called informer was a person I believed to be from the neighborhood, and that its possible he could be located, interviewed and brought to court. I did urge Mr. Greenfield to assist me in checking into this crucial information. I thought that it would make a difference in the case.

Counsel did not request an adjournment or continuance for the purpose of investigating the circumstances surrounding the DD#5, even though at the time he received it its significance

had already been high lighted at the Wade hearing to the effect that the prosecution McRath did only disclose part of the information contained in the DD5 ( ) and (3) although the so-called informer identity and history had been wrongfully withheld.

Mr. Greenfield, knew of this revelation and neglected to investigate it thereby making it impossible for efforts to be made to secure the attendance of this person at the appropriate time before the court (see, the provision under CPL 240.40, 240.50, 60.15(1); also, 620.20(1)(a).

(13) Some time later after the defendant's conviction, with the help of friends and relative's search and assistance looking into this matter, the defendant was able to obtain an affidavit from the so-called informant. (See attached hereto as Exhibit 4). It was discovered that Terrance Haywood resided at 106 Howard Ave., B'klyn, NY 11233, Apt. 2L, that Mr. Haywood had acknowledged being only familiar with the defendant being a old class mates and from occasionally seeing the defendant around the neighborhood; that Haywood personally read the DD#5's (2) and (3) write ups and denied acknowledging the events described therein as to the truth; he stated that he had never been interviewed by Det. Redmond on Jan. 15, 1991 and that he had not informed against the defendant.

(14) The primary contentions of the defendant in this branch is that his due process rights were deliberately violated by counsel because: In that Mr. Greenfield, awareness of the new unredacted DD#5 report No. (3) created an affirmative duty on counsel to seek out an order to set aside the judgment

based on this crucial information alternatively defense counsel should have made substantial enough effort to locate this material witness. With respect to this discovery during the appropriate stages and that counsel did not fulfill his responsibilities with respect to investigation this new information about the informant alleged identity and history. His whereabouts, and information; *such failure by counsel amounted to ineffective assistance of counsel and violated the defendant's due process as well as equal protection rights of the law.*

(15) The defendant argue that Mr. Greenfield had only informed him that the undisclosed information in the unrelated new DDs report No. (3) would not have made a difference in the outcome of the trial and advised me simply to appeal my conviction. Counsel had not explained that the people's failure to provide the material would entitle the defendant to a reversal of his conviction and a new trial.

Moreover, the defendant argues further that Mr. Greenfield had not properly advised him of the legal effects of the assistant D.A.'s non-disclosure and that *the failure of his counsel to communicate adequately with him amounted to ineffective assistance of counsel.*

(16) Since the right to the effective assistance of counsel is guaranteed by both the state and Federal constitutions (N.Y. const., Art. 1, 86; U.S. Const., 6th Amendment), the defendant respectfully submits that under all the circumstances presented by this case he did not receive adequate or effective representation in any meaningful sense of those words by his prior counsel, Steven Greenfield, Esq.

Affirmation in Opposition Dated December 2, 1994

Since meaningful and adequate representation requires that counsel guard against inadmissible evidence and that counsel understand basic principles of criminal law (People v. Brown, 45 N.Y. 2d 852, 410 N.Y.S. 2d (1978) The facts and Law applicable thereto are set forth to show that prior counsel's failure to investigate and all appropriate substantive defense, both at pre-trial and trial, and his failure to master all of the facts relative thereto, resulted in the deprivation of defendant right to effective assistance of counsel.

(17) The defendant urges the court to direct further investigation into the background of this evidence. Based on the new facts and old alike, the annexed exhibits and previous memorandum of law submitted in support of this motion, the court shall vacate the convictions and order a new trial on the facts and law. See CPL 440.30 (3)(a)(b); or, order an evidentiary hearing with presence of defendant and assignment of counsel, See, CPL 440.30(5)(6).

Any replies or answer by the people must be supplied to the defendant at least eight (8) days prior to any hearing date scheduled and allow defendant to respond, CPLR 2214(b).

Wherefore for the foregoing reasons the relief requested must be granted defendant with a new trial; or a hearing with his presence and assignment of counsel.

Affirmation in Opposition Dated December 2, 1994

Dated: Respectfully submitted

s/ Walker, Sherman
Sherman Walker
Pro Se

Sworn to before me this 28th day of July, 1993.

Commissioner of Deeds

ROBERT L. BAYLISS
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires April 23, 1994

s/ Robert L. Bayliss

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM PART (K-9)

Ind. No. 6542/89
2120/91
2119/91

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

– against –

SHERMAN WALKER,

Defendant.

Memorandum of Law
In Support of Motion
To Vacate Judgment

MEMORANDUM OF LAW

INTRODUCTION:

Point B.

All criminal defendants are guaranteed the right to effective assistance of competent counsel at both the pre-trial, trial and on appeal. *See, Strickland v Washington*, 466 U.S. 668 (1984); *United States vs. Cronic*, 466 U.S. 648 (1984); *EVITTS vs. LUCEY*, 469 U.S. 387 (1985); *People vs. Baldi*, 54 N.Y.2d 13; *People v. Sims*, 55 A.D.2d 629.

Affirmation in Opposition Dated December 2, 1994

The defendant will now address the meaningful representation standard of Baldi adopted in People vs. VEZZA, 89 A.D.2d 882 to review the attorney's effectiveness. The VEZZA standard is applicable to the instant case to warrant a reversal of this conviction due to ineffective assistance of counsel at both level of the proceeding(s).

[Attached hereto for this Court consideration Exhibit "A-( )"].

The defendant is relying principally upon *People vs. VEZZA*, 89 A.D.2d 882, 453 N.Y.S.2d 216 at p. 217 for a reversal of his conviction. In *VEZZA* the panel recognized the failure(s) of defense trial counsel to accord meaningful representation to the defendants before and at trial. At bar defendant here argues that the level of the failure(s) of his defense counsel, Mr. Greenfield, are much more unique than the failure(s) outlined in VEZZA. However, the standard the Court applied to *VEZZA* case is applicable to the present case, against which Mr. Greenfield's effectiveness can be measured before this court. A *VEZZA* problem is evident in the instant case. In both, cases, the facts of Counsel failure(s) were serious and several. In both case(s) the identification were the primary issue. In both case(s) the cumulative effect of the failure(s) reached errors of such a nature to deprive the defendant of the effective assistance of Counsel(s).

Affirmation in Opposition Dated December 2, 1994

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE JUDGMENT OF CONVICTION, SHOULD BE REVERSED AND THE INDICTMENTS DISMISSED; IN THE ALTERNATIVE, THERE SHOULD BE A REMAND FOR A NEW AND FAIR TRIAL.

Dated: August 6, 1993
Attica C.F.
Attica, New York 14011-149

Respectfully

s/ Sherman Walker
Pro-Se

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(1)

SUPREME COURT — STATE OF NEW YORK
CRIMINAL TERM PART K-9 QUEENS COUNTY
125-01 QUEENS BOULEVARD,
KEW GARDENS, N.Y. 11415

PRESENT:

HONORABLE LAWRENCE J. FINNEGAN, JR.
JUSTICE

Ind. No. 6542/88 and 2120/91

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

Motion to Proceed in Forma Pauperis
and to Vacate Judgment

Submitted 12/21/92

Affirmation in Opposition Dated December 2, 1994

The following papers numbered 1 to
submitted in this motion

Sherman Walker, Pro Se
For the Motion

John M. Castellano, A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 – 2
Answering and Reply Affidavits	3 –

* * *

For the reasons stated in the People's response in opposition to defendant's motion to proceed in *forma pauperis* and to vacate judgment of conviction, said motion is denied.

This constitutes the decision, opinion and order of the court.

Order entered accordingly.

s/ Lawrence J. Finnegan, Jr.
LAWRENCE J. FINNEGAN, JR.

Dated: February 8, 1993
Gloria D'Amico

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(2)

SUPREME COURT — STATE OF NEW YORK
CRIMINAL TERM PART K-9 QUEENS COUNTY
125-01 QUEENS BOULEVARD,
KEW GARDENS, NY 11415

PRESENT:

HONORABLE LAWRENCE J. FINNEGAN, JR.
JUSTICE

Ind. No. 6542/89
2120/91

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

Motion to Vacate Judgment of Conviction

Submitted 5/27/93

Affirmation in Opposition Dated December 2, 1994

The following papers numbered 1 to
submitted in this motion

Sherman Walker, Pro Se
For the Motion

John M. Castellano, A.D.A.
Opposed

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 – 2
Answering and Reply Affidavits	3 –

* * *

Upon the foregoing papers, the defendant's motion to vacate judgments of conviction is denied (CPL 5440.10(2)(b); (3)(b)).

Order entered accordingly.

The clerk of the court is directed to mail a copy of this order to the defendant's place of incarceration and to the District Attorney.

s/ Lawrence J. Finnegan, Jr.
LAWRENCE J. FINNEGAN, JR.

Dated: June 28, 1993

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(3)
DD# NO. (2) AND (3)

EXHIBIT NO. 2

Robbery

1/14/91

* * *

DETAILS

Investigate: JEWELRY STORE ROBBERIES

Subject: CONFERRAL WITH P.O. FRANK FAVILLA, MTS RIP

1. On 1/14/91 the assigned conferred with P.O. Frank FAVILLA, M.T.S. RIP re: information pertaining to Jewelry store robberies. He related that In addition to names supplied previously by Det. CARUSSO he gave the assigned the following names: Thomas PHILIPS nysid#6604061Z, Trid TIMMINS, AKA BOON NYSID# 6487288Y, William JOHNSON aka WRIGHT NYSID# 5204544N, Heath NEWKIRK NYSID#5577521Y, Steven BUMBRY NYSID# 6784214Q, Steven MURPHY NYSID#6784459 and Fred PETERSON Nysid# 6784320M. That these subjects have committed Jewelry store robberies in Manhattan and may have committed same in Queens Area. He also provided me with the name of Terrence HEYWOOD, NYSID# 5537997P who is currently confined to CoN.C. Correctional Facility BRIG and may be able to confer with.

2. Case Active

Affirmation in Opposition Dated December 2, 1994

CASE
☒ ACTIVE ☐ CLOSED

DATE REVIEWED/CLOSED
1/15/91

IF ACTIVE, DATE OF NEXT REVIEW
1/21/91

REPORTING OFFICER

RANK
DET

SIGNATURE
s/ James P. Redmond

NAME PRINTED
James P. REDMOND

TAX REG. NO.
860006

COMMAND
QRS

REPORTING/CLOSING
SUPERVISOR
s/ [illegible]

SIGNATURE
s/ [illegible]

* * *

Affirmation in Opposition Dated December 2, 1994

EXHIBIT NO. 3

1/15/91

* * *

Investigate: JEWELRY STORE ROBBERIES

Subject: DEBRIEFING OF TERRENCE HEYWOOD

1. On 1/15/91 the assigned in the company of Det. Roy MARTINO where present at N.Y.C. Correctional Facility, Brig institution and interviewed subject Terrence HEYWOOD. He related that the below named persons are responsible for numerous Jewelry store type robberies, in the boro of Queens, Areas of Steinway Street, Myrtle aves and Jamaica ave. over the past two years. The head of ring is Sherman WALKER who's associates are Tony PARKER, Troy "JARED" TIMMINS, SHARAD MORANT, William WRIGHT, Thomas PHILIPS, Trid "BOON" TIMMINS, William "WRIGHT" JOHNSON, Heath NEWKIRK, Steven BUMBURY, Steven MURPHY, Fred PETERSON (these subject he identified by photo. Others that no photos had been obtained where TANGT MORANT, & TRACY. Sherman Walker has all the guns and plans the robberies. Mr. HEYWOOD stated he is only requesting that I confer with his attorney Mr. D'MARCO, B'klyn. Legal Aide 732-5000, ext. 513. and The prosecuting A.DA. of Manhattan Mr. SILVERBERG 212-335-9237. Upon Completion of interview subject requested some money and ten dollars was put into his commisary fund.

2. Case Active

Affirmation in Opposition Dated December 2, 1994

CASE
☒ ACTIVE ☐ CLOSED

DATE REVIEWED/CLOSED
1/15/91

IF ACTIVE, DATE OF NEXT REVIEW
1/22/91

REPORTING OFFICER

RANK
DET

SIGNATURE
s/ James P. Redmond

NAME PRINTED
J. P. REDMOND

TAX REG. NO.
860806

COMMAND
QRS

REPORTING/CLOSING
SUPERVISOR
s/ [illegible]

SIGNATURE
s/ [illegible]

* * *

Affirmation in Opposition Dated December 2, 1994

EXHIBIT (4)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF *NEW YORK*: Part 78

IND. NO. 338
#91

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

— against —

SHERMAN WALKER

Defendant.

Affidavit in Support of Motion for A New Trial

STATE OF NEW YORK)
County of *New York*) SS.:

I, *Terrence Heywood*, being duly sworn deposes and say that:

I reside at 106 Howard Avenue, Brooklyn, New York 11233.

1. I state that presently I made this affidavit without threat or fear of my liberty in support of Sherman Walker's motion for a new trial.

Affirmation in Opposition Dated December 2, 1994

2. I state that I do not personally know, Mr. Walker, or have associated with him in the past. However, I do acknowledge attending the same public school with Mr. Walker in the past, and only know we are from the same neighborhood.

3. I state, that I have previously conferred with a member of, Sherman Walker's family with regards to the statements contained in the two Police reports marked as Mr. Walker Exhibit (A) and (B) along with the transcripts of a Wade hearing minutes marked as Mr. Walker Exhibit (c) I believe; for which I am the subject of discussion contained therein.

I further state, I am the subject referred to in the Police interview reports in that the NYSID# 5537997P clearly matches the NYSID# NO. contributed to me.

4. I have been arrested before in the past. Although I have never been arrested by a Detective Frank Favilla, Shield #2048, of the M.T.S., R.I.P. till this present day. I do not personally know Detective Frank Favilla, Shield #2048, nor have I carried out any informant work for any member of the Police Department in the past. In that I am not a confidential informant with a Registered Number that has or have worked for Detective Frank Favilla, Shield #2048, in the past.

5. Further I do not personally know a Detective Redmond, Shield #2970, of Queens' Robbery Squad. Neither have I met with Detective Redmond on Jan. 15, 1991, at the N.Y.C. Correctional Facility, Brooklyn Brig, or informed him of any information of any kind against Mr. Walker in compliance with Detective Frank Favilla, Shield #2048, as indicated in

Affirmation in Opposition Dated December 2, 1994

Mr. Walker Exhibit (A) and (B), transcribed by Detective Redmond, Shield #2970.

6. I made the above determination when I actually observed the Police reports describing substance of this information. That this information transferred by Detective Frank Favilla, Shield #2048, of the M.T.S. R.I.P. Precinct was false and known by the detective to be false.

7. I swear that the aforementioned facts are true under the penalty of perjury.

Respectfully submitted

s/ Terrence Heywood
Terrence Heywood

Sworn to before me this
26th day of December, 1992.

s/ Pedro Escrogima
PEDRO ESCROGIMA
NOTARY PUBLIC, State of New York
Qualified in New York County
Commission Expires December 31, 1994

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS PART(K9)

Index No. _____

In the matter of the application of
Sherman Walker,

For permission to proceed as poor person.

Petition to proceed as a poor person

TO THE SUPREME COURT OF THE STATE OF NEW YORK. COUNTY OF QUEENS:

The application of Sherman Walker respectfully shows to this court:

That the defendant is a prisoner of the state of New York presently detained at Attica Corr. Fac. Attica New York 14011-149. That the defendant is about to commence an action for judgment, annulling a determination of the Supreme Court, pursuant to Art. 22 of the CPLR and Art. 440 of the CPL.

That the defendant makes this application in the County of New York pursuant to Art. 5 of the Civil Practice law and rules because it is the county in which the respondent has its principal office and facilities and made the determination complained of in this action.

That the defendant makes this application pursuant to Sec. 1101 and 1102 of the CPLR upon the grounds that he is

unable to pay the cost, fees and expenses necessary to prosecute this action.

That the defendant will be unable to prosecute this action unless permitted to do so as a poor person.

That the defendant is fully cognizant of the fact that the attorney assigned by the court herein will serve without compensation.

That the defendant does not know of any attorney who is willing to represent him in this proceeding, and therefore desires that an attorney of competent experience be assigned to represent the defendant in this proceeding without compensation.

I believe that I am not able to do an adequate job of representing myself in the above entitled proceeding because: The legal issues are complicated and I don't know how to support my petition on the law; and there are other witnesses who are potential witness on my behalf but I cannot get in touch with then while I am in prison.

Defendant is fully aware that he does not have a right to counsel for the purposes of assistant on his motion papers purposes of assistant on his motion papers pursuant to Art. 440, however, he seeks this court indulgents on any error or should an evidentiary hearing be granted, he seeks the assignment of counsel.

That the defendant does not have the freedom or opportunity to insure timely service of all necessary documents upon the

respondent of the State of New York, and therefore desire that the clerk of court or some other responsible person be assigned to serve on his behalf.

Wherefore, the defendant prays that he be permitted to prosecute this action against respondent, as a poor person, and prays that the court assign the clerk of the court or some other responsible person to enter the index number and conform all copies in this proceeding, to serve all the necessary documents on his behalf, and to return one conform copy of each document to defendant.

Respectfully submitted

s/ Sherman Walker
Sherman Walker

Sworn to before me this __ day of _____ 199__

Affirmation in Opposition Dated December 2, 1994

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No. _____

Sherman Walker,

Petitioner,

– against –

The people of the State of New York

Respondent

Affidavit in support of petition to
proceed as a poor person

State of New York)
County of WYOMING) SS.:

Petitioner moves the court to use its discretionary power under 18 USC Sec. 300 6 ALG), the CPLR Sec. 1101 and 1102 to appoint counsel to represent him in the above entitled case.

I am the defendant in the above captioned case, and I make this affidavit in Support of the annexed petition to proceed in forma pauperis.

I am present in the custody of the Anthony F. Zon of Attica Corr. Fac. Attica N.Y. 14011-149, pursuant to a judgment

of the Supreme Court of the State of New York, Queens County, rendered Jan. 30, Mar. 30, June 6, 1993 convicting me of robbery in the first degree, on one case, robbery in the second, and robbery in the third degree separately as to each indictment, ultimately the defendant was sentenced to seven to fourteen years imprisonment.

I am unable because of my indigent status, to pay the costs, fees and expense necessary to prosecute this action. I am currently incarcerated and earning nothing. And I own no property. No other person has a beneficiary interest in the outcome of this action.

I believe in good faith that I am entitled to the relief that I am seeking in this case.

Wherefore, I respectfully ask for an order permitting me to prosecute this action as a poor person, that I be furnished with a copy of the stenographic transcript of this proceeding without fee, should an evidentiary hearing be ordered, and that I be assigned an attorney to represent me on this action and for other and further relief as may be proper and equitable.

Affirmation in Opposition Dated December 2, 1994

Respectfully submitted

s/ Sherman Walker
Defendant Pro-Se

Sworn to before me this 28 day of July 1993.

Commissioner of Deeds.

ROBERT L. BAYLISS
Notary Public, State of New York
Qualified in Wyoming County
My Commission Expires April 23, 1994

s/ Robert L. Bayliss

Affirmation in Opposition Dated December 2, 1994

Present. Hon. _____ Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, MOTION TERM

ORDER NO. _____

In the matter of the Application of
Sherman Walker

To proceed as a poor person

On reading and filing the annexed petition of Sherman Walker, Sworn on the __ day of _____, 199__ and the court being satisfied with the truth of the facts alleged and it appearing that the petitioner may have a good cause for a judgment vacating the determination of the Supreme Court of New York State, Queens County pursuant to CPLR Sec. 2221 and Art. 440 of the CPL.

Now, On motion of the petitioner, Sherman Walker, it is ORDERED, that the petitioner be assigned to prosecute this action as a poor person, and it is further ordered that petitioner appellant counsel be assigned should an evidentiary hearing or oral argument be granted, and that a copy of the stenographic transcripts be provided to the petitioner and assigned counsel, and it is further

ORDERED, that the clerk of this court be and be hereby is directed to make no charge for costs or fees to defendant in connection with the prosecution of this action and be further directed to enter the index number and to conform all copies

of petitioner's legal papers in this action, to serve on petitioners behalf all necessary copies the order to show cause, affidavit in support, and all other document filed in this proceeding by petitioner that petitioner should otherwise be required to serve upon the respondent and the district attorney and to return a conformed copy of each document to petitioner, and it is further

ORDERED, that Alden T. Lewis hereby is assigned to said Sherman Walker as the attorney of record whose duty it shall be to conduct said action free of charge to said Sherman Walker [see attached Exhibit A(5)].

ENTERED.

JUSTICE OF THE SUPREME COURT

Dated.

Affirmation in Opposition Dated December 2, 1994

EXHIBIT A(5)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLLAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., J.J.

92-01662, 92-02880 and 92-04929

The People, etc.,

respondent,

v.

Sherman Walker,

appellant.

(Ind. Nos. 6542/89, 2119/91 and 2120/91)

DECISION & ORDER ON MOTION
Motion by Counsel to be Relieved of Assignment

Renewed motion by the appellant *pro se* for the assignment of counsel on an appeal from a judgment of the Supreme Court, Queens County, rendered June 6, 1992, indictment number 2120/91.

Affirmation in Opposition Dated December 2, 1996

Motion by assigned counsel to be relieved of an assignment to prosecute appeals from two judgments of the Supreme Court, Queens County, rendered February 27, 1992 and April 9, 1992, respectively. The appellant's motion to dispense with printing and for assignment of counsel was granted on April 6, 1992 on indictment number 6542/89 and May 26, 1992 on indictment number 2119/91, respectively, and the following named attorney was assigned as counsel to prosecute the appeals:

Phillip L. Weinstein, Esq.
The Legal Aid Society
15 Park Row (18th Floor)
New York, New York 10038

Upon the papers filed in support of the motion and the papers filed in opposition or in relation thereto, it is

ORDERED that the motion is granted, and the former assigned counsel is directed to turn over all papers in the action to new counsel herein assigned; and it is further,

ORDERED that pursuant to County Law § 722 the following named attorney is assigned as counsel to prosecute the appeals:

Alden Lewis, Esq.
457 Fulton Street
Brooklyn, New York 11217

and it is further,

Affirmation in Opposition Dated December 2, 1996

ORDERED that the appellant's time to perfect the appeals is enlarged; assigned counsel shall prosecute the appeals expeditiously in accordance with this court's rules (22 NYCRR 670.1, *et seq.*) and written directions.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

Appellant's Address:

92 A 7140
Downstate Corr. Fac.
P.O. Box 445
Fishkill, New York 12524

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ON MOTION DATED APRIL 21, 1994

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
VINCENT R. BALLETTA, JR., JJ.

92-01662
92-02880
92-04929

The People, etc.,

respondent,

v

Sherman Walker,

appellant.

(Ind. Nos. 8542/89, 2119/91, 2120/91)

DECISION & ORDER ON MOTION

Decision and Order on Motion Dated April 21, 1994

Motions by the appellant *pro se* for (1) assignment of new counsel on appeals from three judgments of the Supreme Court, Kings County, rendered February 27, 1992, April 9, 1992, and June 6, 1992, and (2) for leave to file a supplemental brief on the appeals, and to be furnished with a copy of the typewritten transcripts of the stenographic minutes.

Upon the papers filed in support of the motion and the papers filed in opposition or relation thereto, it is

ORDERED that the motion for the assignment of new counsel is denied; and it is further,

ORDERED that the motion to file a supplemental *pro se* brief is granted; and it is further,

ORDERED that the District Attorney shall file the typewritten transcripts of the stenographic minutes and the clerk of this court shall deliver those minutes to the person in charge of the institution wherein the appellant is incarcerated for examination by the appellant; the transcripts shall be returned to this court when the appellant files the supplemental brief or informs this court that no supplemental brief will be filed; and it is further,

ORDERED that the appellant shall file nine copies of the supplemental brief and serve one copy on the District Attorney.

Upon delivering the minutes to the institution, the clerk of this court shall advise the appellant of the date by which the minutes are to be returned and the brief filed.

Decision and Order on Motion Dated April 21, 1994

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and BALLETTA, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

April 21, 1994

COVER SHEET OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT DATED MARCH 9, 1994 AND MOTION FOR ASSIGNMENT OF NEW COUNSEL

APPELLATE DIVISION
SUPREME COURT OF THE STATE OF NEW YORK
SECOND JUDICIAL DEPARTMENT
45 MONROE PLACE
BROOKLYN, N. Y. 11201

MARTIN H. BROWNSTEIN
CLERK OF THE COURT

ARNOLD EDMAN
MEL E. HARRIS
DEPUTY CLERKS

March 9, 1994

Sherman Walker
92-A-7141
Box 500
Elmira, N.Y. 14902

RE: CASE # 92-01662 92-02880 92-04929
(3-Separate Cases)
Peo. v WALKER, Sherman
Ind.#6542/89-2119/91-2120/91
Appeal from JC-2/27/92-4/9/92-6/6/92
Supreme, Queens

Cover Sheet and Motion for New Counsel

Dear Sir/Madam:

We have received your application for the following relief:

Motion for assignment of new counsel

The application will be placed on the motion calendar for 3/25/94

Yours truly,

CLERK'S OFFICE

NOTICE TO: Richard Brown w/papers &
Alden Lewis w/papers

Dear Sir/Madam:

The above named appellant has made an application for the following relief:

Motion for assignment of new counsel

This application will be placed on the motion calendar for 3/25/94. On or before that date, please furnish the Motion Clerk with an affidavit expressing your views in this matter.

Very truly yours,

CLERK'S OFFICE

Cover Sheet and Motion for New Counsel

92-01662
92-02880
92-04929

Mr. Sherman Walker
Box 500
ELMIRA, NEW YORK
14902-0500
ID # 92A7141 I-1-26

Dated: February 28, 1994.

To: Hon. Martin Brownstein, Clerk
App. Div. 2nd. Dept. Sup. Ct.
45 Monroe Place
B'klyn, NY 11201

Re: Notice of Motion for reassignment of Counsel/
Ind. No. 6542/89, 2119/91, 2120/91, and
Withdrawal of Counsel main brief.

Dear Sir:

Please acknowledge enclosed are the appropriate legal documents in support of my Notice requesting this Court aid, requesting reassignment of appellant Counsel, and withdrawing appellant main brief.

Please send my legal document to the Justices of the Court for a determination and opinion.

Thank you so much.

Respectfully,

s/ Walker, Sherman
Appellant Pro-Se

Cover Sheet and Motion for New Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Queens County

Ind #s: 2119/91; 6542/89; 2120/91
AD #s: 92-02880; 92-01662

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

SHERMAN WALKER,

Defendant-Appellant.

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the annexed affidavit of Sherman Walker and all the prior proceedings herein, the undersigned will move this Court, at the Courthouse, 45 Monroe Place, Brooklyn, New York 11201 at 9:30 a.m. on March 5, 1994, or as soon thereafter as counsel can be heard, for an order relieving Alden T. Lewis, Esq., as assigned counsel to appellant because of a conflict of interest, assigning other counsel, and for such other and further relief as this Court deems just.

Cover Sheet and Motion for New Counsel

Dated: New York, New York
Feb. 15, 1994

Yours, etc.,

s/ Sherman Walker
Appellant – *Pro-Se*
Box 500
ELMIRA, New York
14902-0500

TO: MOTION CLERK
Appellate Division
Second Department
45 Monroe Place
Brooklyn, New York 10010

HON. RICHARD A. BROWN
District Attorney
Queens County
125-01 Queens Boulevard
Kew Gardens, New York 11415

SHERMAN WALKER
92 A 7141
ELMIRA Correctional Facility
P.O. Box 500
ELMIRA, New York 12524

Cover Sheet and Motion for New Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

Under Ind. No.: 6542/89, 2119/91 and 2120/91

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

vs.

SHERMAN WALKER,

Defendant-Appellant.

RECONSIDERATION AFFIDAVIT IN SUPPORT OF MOTION TO WITHDRAW MAIN BRIEF AND SUBSTITUTE APPELLATE COUNSEL FOR NEW COUNSEL.

STATE OF NEW YORK)
County of Chemung) SS.:

(1). I, *Sherman Walker*, does hereby affirm the following statements to be true under penalties of perjury, except those made upon information and belief, which he believes to be true:

(2). I make this Petition in support of my motion for reassignment of counsel and withdrawal of appellant Counsel's main brief(s) submitted about Jan. 94, 28th day. Pursuant to article 18-B and Section 722-C alone with the

provision established in the (A.B.A.) American Bar Association and that this Honorable Court authorize said services Nunc Pro Tunc so that I am properly afforded an appellant Counsel in my interest to prepare my appellant brief.

(3). I am a lay person in matters of certain areas of this case on the Law and seek to have this Court's indulgence for error or fault pursuant to section 2101(f) of the Civil Practice Law and Rules of the State of New York.

Mr. Lewis, who has his office at 657 Fulton Street, Brooklyn, NY 11217, was assigned by this Court pursuant to 18-B of the County Law, to represent Mr. Walker-Appellant on his appeal from a Judgment of the Supreme Court, Queens County under indictment number *6542/89, 2119/91 and 2120/91*, respectively.

(4). I know that I was convicted of a serious crime(s) because of an unfair trial, and a disinterested Counsel. I must have competent, caring, effective and energetic Counsel "now" in the preparation of my appeal.

(5). This case(s) have only been in process from __ day of May, 1993 and my assigned appellant counsel Mr. Lewis (*see*, attached Ex.(A)), did not meet the best interest of his Client[1]. In fact Appellant Complaint reads as follows:

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1. App. Counsel preceded by a "App. Couns." refer to Appellant Counsel.

Cover Sheet and Motion for New Counsel

I.

(a). *App. Couns.*, rushed appellant's three briefs without spending quality time for research and appropriate inquiries and at the satisfaction of the Court.

(b). *App. Couns.*, obviously failed to bring to the Court's attention his need for a Co-Counsel assignment to aid him in areas on the construction and research of the pending three appeals in this court.

(c). *App. Couns.*, did not spend quality time on Appellant three appeals. (See Exh(B) attached.)

(d). *App. Couns.*, submitted Appellant briefs to this court without first obtaining the approval of his client's interest in the matter. (*See* Ex(B) attached.)

(e). *App. Couns.*, improperly mislead his client that he would not submit the brief(s) until Appellant had reviewed them for approval first. (See Ex(B) supra attached).

(f). *App. Couns.*, mislead Appellant whereby providing Appellant with phone numbers to contact him which such Phone numbers were insufficient to reach said Counsel. (i.e. the phone number was deactivated, see also Ex.(C) attached.)

(g). *App. Couns.*, failed to responsively respond to Appellant letter(s), dated: 8/9, 16/93, 8/25/93, 9/20/93, 10/12/93 and 11/1/93. (See Ex.(B) attached). Some letters omitted.)

(h). *App. Couns.*, failed to aid appellant to consolidate his C.P.L. 440.10 "pro se" motion to his direct appeal even when his Client sought his aid. Counsel should have known that the Court would deny the Appellant request, in all likelihood.

(i). *App. Couns.*, failed to adequately address to this Court the circumstances revolving around an exculpatory affidavit given to Appellant by the People alleged informant "Mr. T. Heywood", whom personally transcribed in an affidavit that Det. Redmond called by the assistant district attorney under Ind. No. 2119/91 and 2120/91 lied against him and that he was never interviewed by any detective(s) to inform against Mr. Walker appellant. (See Ex(D) attached.)

Appellant rightfully asserts that his appellant Counsel "Mr. Lewis" knowledge of the exculpatory information contained in the affidavit when compared against the information in Appellant main brief Case No. 92-02880 and Case No. 92-04929 proves appellant Counsel deliberately indicated false facts in the brief. The Appellant further assert that this misconduct on Mr. Lewis part constitutes grounds for Mr. Lewis to be substituted and deemed in violation of "Misrepresenting" his client on this level. Mr. Lewis false statements of facts about the allege informant is sharp evidence of this Appellant Counsel intentional misrepresentation, (i.e. compare Ex(D) supra with appellant main brief statement of facts under Ind. No. 2119/91 and 2120/91 about the alleged informant.

(j). *App. Couns.*, failed to move for an extension to adequately prepare the main brief.

(k). *App. Couns.*, failed to raise the issue(s) he had agreed to raise for appellant. (*See*, Ex(B) attached.)

(l). *App. Couns.*, raised issues in the main brief in an insufficient form, style and manner satisfactorily to an appellant brief.

(m). *App. Couns.*, lied to his client by not raising the claim of ineffective assistance of counsel. (*See*, Ex(B) attached.) By not raising this issue, counsel did not conduct himself in the best interests of his client "request and interest."

(n). *App. Couns.*, failed to correctly address the improper statutory and constitutional violations in appellant brief(s).

(o). *App. Couns.*, failed to alert the Court to prosecutorial misconduct committed against his client under the three indictments.

(p). *App. Couns.*, had no real genuine interest in his client's case. Appellant argues that at a professional point of view, his assigned appellant counsel *brief* was not prepared in the best interests of his client's innocence.

(q). *App. Couns.*, is in violation of the attorney client privilege and the Code of his professional responsibilities to his client. *See*, Sachem v. U.S., 34 U.S. 1, 72 S.Ct. 451 (1952).

Cover Sheet and Motion for New Counsel

II. Additional Ground for Withdrawal of the brief and substitution of Counsel

Appellant argues that since he has sought the refuge of this court to tell those in higher authority of his "attorney" misconduct, *Mr. Lewis*, has intentionally violated the confidentiality of the lawyer-client relationship, alternatively, it can also be found that, *Mr. Lewis*, have misrepresented Mr. Walker, and that appellant Counsel was not interested properly constructing appellant main brief.

Appellant further assert that an investigation into the background of the allegations alleged against this Counsel will prove there is an urgent need to remove this Counsel from appellant case in the interests of justice. *In addition, appellant "contend(s)" that he has made a prima facie case of misrepresentation on Appellant counsel part*, therefore, the brief should be withdrawed.

(6). Under these circumstances, it would constitute a conflict of interest for Mr. Lewis to be further allowed to represent appellant on these appeal under the above registered indictment. Even were it later shown that a conflict did not exist in this case, *Mr. Walker* should be assigned new appellant counsel immediately under each indictment, so that helpful counselor(s) whom are interested can handle Mr. Walker's appeal, *because Mr. Walker issues are complex and of a constitutional dimension.*

(7). Comparing the level of representation provided by *Mr. Lewis* Esq., with effective assistance on the A.B.A. Standard, Attorney-Client privilege, it becomes self evident that said representation and/or preparation do not measure up to the constitutionally required level.

. Cover Sheet and Motion for New Counsel

(8). *Mr. Walker* remains incarcerated pursuant to the judgment above. Consequently, Appellant financial circumstances have not changed since he requested the assignment of counsel to perfect his appeal.

No previous application for the same or similar relief herein prayed for his been forthcoming.

Wherefore, *Mr. Lewis* Esq., should be ordered relieved and substituted through assignment of another attorney pursuant to article 18-B section 722-C of the county law; and/or in the alternative, that a hearing be conducted to determine the feasibility of defendant's claim and issue raised against appellant counsel.

Respectfully submitted,

s/ Sherman Walker
Mr. Walker/Appellant
Pro Se
Elmira, New York
B&C 92A7141

Sworn to before me this
15th day of February 1994.

Notary Public

CAROL M. GRIFFITH
Notary Public, State of New York
Qualified in Chemung County No. 4982268
Commission Expires May 28, 1995

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT ON MOTION DATED MAY 7, 1992

SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

WILLIAM C. THOMPSON, J.P.
CHARLES B. LAWRENCE
JOHN COPERTINO
FRED T. SANTUCCI, JJ.

92-03188

The People, etc., ex rel. Sherman Walker,

petitioner,

v

Eugene Ienuso, Warden, et al.,

respondents.

2119-91

DECISION & ORDER ON MOTION

Application by the petitioner for a writ of habeas corpus.

Upon the papers filed in support of the application and the papers filed in opposition thereto, it is

Decision and Order on Motion Dated May 7, 1992

ORDERED that the application is denied and the petition is dismissed, without costs or disbursements.

THOMPSON, J.P., LAWRENCE, COPERTINO and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

May 7, 1992

PETITION FOR WRIT OF HABEAS CORPUS
DATED APRIL 22, 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM SECOND DEPARTMENT

Ind. No. 2120/91
2119/91
2467/91
2984/91
2960/91
NYSID#50266220

Part AA-2 Queens

Supreme Court, Place Of Incarceration Queens

People of the State of New York
Ex Rel: Sherman Walker

Petitioner.

– against –

Eugene Ienuso, Warden
George Motchan Detention Center
and
Thomas Coughin, Commissioner of the
Department of Correction Services
and
In the Matter of an Application by John J. Santucci,
District Attorney, Queens County

Respondent.

Petition for Writ of Habeas Corpus

Petition For Writ Of Habeas Corpus

To: A Justice of the Supreme Court of the State of New York
Appellate Term Second Department

The Petition of Sherman Walker, respectfully shows that:

1. This Petition is made on behalf of Sherman Walker, who is incarcerated/detained at George Motchan Detention Center, located at 15-15 Hazen Street, East Elmhurst, New York 11370.

2. The cause or pretense of the detention, according to the best knowledge and behalf of the Petitioner is, and Court Order of Committment from the Queens County Supreme Court.

3. That a Court or Judge of the United States does not have exclusive jurisdiction to order the release of said person.

4. This Writ is sought because of an illegal incarceration/ detention, the nature of the illegality being that the petition was:

Denied Due Process under the 14 Amendment by a Court Order that compelled petitioner to participate in a Lineup without his retained counsel presence.

Denied a Felony hearings Pursuant to C.P.L. 180.70.

Denied the right to testify before the Grand Jury pursuant to C.P.L. 190.50.

That the Court lack the proper County jurisdiction over Petitioner Person.

Petition for Writ of Habeas Corpus

SUMMARY ARGUMENT

5. That the relator is unlawfully being detained for the following reasons:

A) On March 27, 1991, the Petitioner was incarcerated at the Brooklyn House of Detention on an unrelated charge.

When on March 23, 1991, Miss Norma Garcia of Queens D.A. office notified detective Redmond from the 109th pct. that a take out order regarding Petitioner Sherman Walker for line ups to be conducted on March 27, 1991 between the hours of 1900 and 2100 hours, at the 109 pct. subject Sherman Walker, NYSID #50266220,

103 pct. 61# 10025 — Case 90/91
114 pct. 61# 17376 — Case 91/91
114 pct. 61# 6318 — Case 92/91
103 pct. 61# 14838 — Case 93/91
103 pct. 61# 15066 — Case 94/91
115 pct. 61# 17169 — Case 142/91

The Petitioner was denied the services of his retained counsel at the line ups that were conducted by law enforcement agencies whom knew the Petitioner already had counsel. The Petitioner further state that his attorney right and access to the line up was blocked by the law enforcement agencies conducting said line ups.

The Petitioner contends that this violated his constitutional Sixth and Fourth amendment rights. In support the Petitioner relies on the merits stated in Matter of Santucci, 458

N.Y.S.2d 1008 (Sup.1983) (supra) Memorandum Cornelius J. O'Brien, Justice., held that once accused at any stage before or after arraignment, to knowledge of law enforcement agencies, already has counsel, his right or access to counsel may not be denied and his attorney may not be excluded from a line up proceedings.

B) That the annexed affirmation of Gary F. Miret, dated March 18, 1991 and affidavit of detective James Redmond, shield #2970 (see exhibit A order to Show Cause), had here by stated the following:

ORDERED, that the 18B County appointed counsel shall be appointed counsel for Petitioner.

ORDERED, that appointed counsel (see exhibit B annexed here to) Submit an order to produce Petitioner, At Part AA-2, at the Court House, 125-01 Queens Blvd. Kew Garden, New York no later than March 20, 1991, if counsel believes petitioner presence to be required at the hearings on this matter. Failure of counsel to submit an order to produce for petitioner by March 20, 1991 will be deemed by this court a waiver by counsel of petitioner presence at the hearings.

C) The Petitioner contends that the facts were insufficient to justify criminal term part AA-2 finding of probable cause and that the respondents had no jurisdiction to compel him to appear in a line up relating to crimes alleging committed inside of this state, to wit, in Queens County pursuant to a court order constituted "Seizure" without adequate basis (See, Santucci v. Andrews, as stated in the Memorandum of

Cornelius J. O'Brien, Justice., held that the People must submit a Supplemental affidavit or affirmation settings fourth specifics as to the connections of the witness(es) to the alleged crime, and the prospective defendant can not, in any event, be viewed by witness(es) to other crimes in connection with which he may be a suspect in absence of a showing of probable cause to arrest him for each separate crime. Furthermore, the Petitioner, argue that the court erred in appointing an 18B attorney for petitioner. Since the petitioner already had the services of a retained attorney during the time the 18B was appoint on March 22, 1991 by the court. The petitioner counsel nor him was given notice about a hearing scheduled to take place on March 20, 1991, or any notice about a subsequent line up (see, C exhibit annexed hereto). The Petitioner contends that his due process rights has been denied in it's entirety. (People v. McLain, 88 Misc. 2d 693, 389 N.Y.S. 2d 976 state that "it has been consistently held by the courts of this state that a suspect incarcerated on an unrelated charge cannot be made to stand in a lineup unless he has been given proper notice in an application spelling out probable cause for granting of the relief sought (see, Matter of Walter Pidgeon, supra, 80 A.D. 2d 568, 435 N.Y.S.2d 763). Moreover, the detention of petitioner in order that he be made to participate in a lineup to be viewed by the witness(es) who have photographically identified him as the individual who committed the alleged crime, constituted seizure without adequate basis (see, Alphonso C. v. Morgethau, 376 N.Y.S.2d 126 A.D. 1st Dept.) The District Attorney made a application for order directing petitioner participation, the petitioner had not been arrested, charged with commission of crime or otherwise named in an accsatort instrument, in light of the people supplemental affirmation

and affidavit it is absence of a showing of probable cause to arrest petitioner for each separate crime. The Respondents application should not have been granted to detain petitioner merely because of a want of power (Matter of Mackell v. Palermo, 59 Misc.2d 760, 765, 300 N.Y.S. 2d 459, 464).

6). That the Petitioner was denied a preliminary-Grand Jury proceeding in the following manner:

After the lineup and prior to a Grand Jury presentation no preliminary hearing was held. The petitioner had a Statutory right to a prompt hearing pursuant to CPL 180.10(2), Where the petitioner is incarcerated, the hearing must be held within one hundred twenty hours CPL 180.80 as amended by 1982 Session Laws ch. 556 § 1; the prosecutor avoided the preliminary hearing by presenting the matter directly to the Grand Jury. (see Court Transcript on this matter) on May 1991 the case was adjourned without notice that said petitioner wished to appear and testify before any pending Grand Jury proceeding. The petitioner attorney was not notified of any preliminary or Grand Jury proceeding. The matter was instead forwith to part K-9, at the court house, 125-01 Queens Blvd. Kew Gardens New York. A petitioner in a Felony case has an absolute constitutional and statutory right to be present at all stages of the criminal procedures and the aid of counsel (N.Y. Const. Art. I § 6).

7. The court lack the proper county jurisdiction over petitioner person as follow:

The petitioner asserts that the order of the criminal term court part AA-2 activated was without county

jurisdiction and is entirely void. The District Attorney Office did not afford petitioner to oppose the court order to participate in the line ups and (2) the failure to establish probable cause in the annexed affirmation of A.D.A. Gary F. Miret, and the affidavit of detective James Redmond, as required by the law. It is the petitioner contention that the court lack county jurisdiction over his person on those basis.

8. An appeal has not been taken from the order by virtue of which said person is incarcerated/detained. The result of said appeal is not applicable.

9. Petitioner is a layman in the Matter of the Law and seek this court's indulgence for error or fault, pursuant to section 2101(1) of the Civil Practice Law and Rules of the State of New York.

10. No previous application for relief sought herein has been made in this court or any other court.

WHEREFORE, your petitioner prays that a Writ Habeas Corpus be issue, directed to the respondent, requiring the respondent to release the said petitioner Sherman Walker, or Whatever other such name maybe know as before a Justice of this Court at 125-01 Kew Garden, Queens Blvd, New York 11415, Special Term, Part ____ thereof on the __ day of _____, 19__.

Petition for Writ of Habeas Corpus

Respectfully submitted

s/ Walker, Sherman
Sherman Walker
Petitioner, Pro Se Motion

SWORN TO BEFORE ME
APRIL 22, 1992

s/ Jeffrey A. St. Clair
JEFFREY A. ST. CLAIR
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-4913073
QUALIFIED IN KINGS COUNTY
COMMISSION EXPIRES NOVEMBER 23, 1992

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

SP0068-91

NYSID #5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

ORDER TO SHOW CAUSE

Upon the annexed affirmation of Gary F. Miret, dated March 18, 1991 and the affidavit of Detective James Redmond, Sh. #2970 complaint reports and upon all the proceedings heretofore had herein.

Let Sherman Walker show cause, at Part AA-2, of this Court, at the Courthouse, 125-01 Queens Boulevard, Kew Gardens, N.Y. on March 22, 1991 at 9 AM of said day or as soon thereafter as counsel may be heard,

Why an Order should not issue commanding and directing Sherman Walker to appear and participate in a lineup to be conducted by the Office of the District Attorney of Queens County at the 109th Precinct on March 25, 1991 or as soon thereafter as is mutually convenient, and it is hereby

ORDERED, that the 18B County appointed counsel shall be appointed Counsel for Sherman Walker in the above entitled action and in all related proceedings and matters, and it is further

ORDERED, that counsel submit an Order to Produce Sherman Walker, to this Court no later than March 20, 1991, if counsel believes his presence to be required at the hearing on this matter. Failure of defense counsel to submit an Order to Produce for this Sherman Walker by March 20, 1991 will be deemed by this Court a waiver by counsel of Sherman Walker's presence at this hearing.

Sufficient cause therefore appearing, let service of a copy of this Order, together with the paper which it was granted, upon 18B County appointed counsel the attorney for the Sherman Walker on or before March 18, 1991 be deemed sufficient service.

Dated: Kew Gardens, N.Y.
March 18, 1991

s/ Vincent F. Naro
Justice of the Supreme Court
HON. VINCENT F. NARO

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS — Part AA-2

NYSID 5026622Q

In the matter of an Application by JOHN J. SANTUCCI, DISTRICT ATTORNEY, Queens County, for an Order directing that a lineup be held and that inmate Sherman Walker be placed in said lineup.

AFFIRMATION

Gary F. Miret, under penalty of perjury and pursuant to Section 2106 of the C.P.L.R., affirms and says:

1. That I am an Assistant District Attorney of the County of Queens, of counsel to John J. Santucci, District Attorney of Queens County, and that I am in charge of the investigation of this case.

2. That the appearance of the above-named defendant is required in order to conduct a lineup relating to the charges of Robbery for which he is a suspect, said crimes having been committed in Queens County.

3. That probable cause exists to believe that the above-named committed the alleged crime for the following reasons:

Upon information and belief, and based upon information supplied to my office by Detective James Redmond, Sh. #2970, on January 18, 1991, January 24, 1991, January 25, 1991 and February 14, 1991, photographs of the

subject of this investigation Sherman Walker, NYSID #5026622Q were identified to Detective James Redmond, Sh. #2970 by the persons from whom the subject forcibly took property, in Queens County, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990.

Annexed to this application are lettered exhibits. These exhibits are photocopies of official police reports, that establish more fully the circumstances of the incident and the identification.

It is therefore requested that 18B County appointed counsel in Queens be appointed counsel on this case for the subject of this investigation.

4. That the Office of the District Attorney of Queens County is to conduct a lineup at the 109th Precinct on March 25, 1991 between 7:00 – 9:00 p.m.

5. That no prior application has been made for the relief herein prayed for.

WHEREFORE, the People respectfully request that the Court issue an Order commanding and directing the defendant herein to appear and participate in the aforementioned lineup.

Dated: Kew Gardens, N.Y.
March 18, 1991

Respectfully submitted,

JOHN J. SANTUCCI
DISTRICT ATTORNEY
QUEENS COUNTY

by: s/ Gary F. Miret
Gary F. Miret
Assistant District Attorney

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CRIMINAL TERM

NYSID #5026622Q

THE PEOPLE OF THE STATE OF NEW YORK

– against –

SHERMAN WALKER,

Defendant.

STATEMENT IN SUPPORT

STATE OF NEW YORK)

COUNTY OF QUEENS) :ss:

Detective James Redmond, Sh. #2970, being duly sworn deposes and says:

A photograph of subject SHERMAN WALKER, NYSID #5026622Q has been identified to myself as the person who forcibly took property from persons known to myself and the District Attorney's Office, on June 26, 1989, March 31, 1990, August 30, 1990, September 7, 1990, September 19, 1990 and October 5, 1990 in Queens County, by the persons from whom the property was taken.

Attached to this statement in support are photo copies of official police reports that more fully establish the circumstances of the incident and identification.

I have read the above statement and swear that it is all true.

All false statements made herein are punishable as a Class "A" Misdemeanor pursuant to Section 210.45 of the New York State Penal Law.

s/ James Redmond
Detective James Redmond,
Sh. #2970

Dated: March 6, 1991

Petition for Writ of Habeas Corpus

COMPLAINT

Robbery

160.15

* * *

Actions of Victim Prior to Robbery, Larceny or Sex Crimes:
Working in Store

* * *

37A Living Together?
No

38 Can Identify?
Stranger

39 Comp. Rec'vd:
Radio

Will View Photo?
Yes

Will Prosecute?
Yes

Reporter ☐ Witness ☒

* * *

Position/Relationship:
Sales person

* * *

Name of Location (Specific):
Jewelry store

40 Address/Location of Occurrence:
28-03 Steinway St.

41 Sec/Post of Occ.:
David

44 Visible by Patrol:
☐ Yes ☒ No

* * *

61 Rep. Ag'cy Code:
N.Y.P.D.

* * *

Case Status:
☒ Open ☐ Closed

Unit Referred To:
114 RIP

* * *

Quantity	Article	Description – Brand, Model, Serial No.
1	Necklace	T/M Channel setting with herring bone chain and 1½ carat white stones (diamonds) valued at $2800.00
1	Bracelet	T/M (Square) woman's bracelet with 78 points of white stones (diamonds) valued at $2000.00

Property Summary

Item	64	66 Value Stolen
Jewelry	05	$4800.00

* * *

Total No. of Perpetrators:
Wanted 1

Weapon:
☒ Used ☐ Possessed

Describe Weapon (if firearm, give color, make, calibre, type, model, etc.):
Canister of mace

Wanted ☒ Arrested ☐

Sex:
M

Race:
Blk

* * *

Age:
28-30

Height:
5 ft. 6-7 in.

Weight:
160

* * *

Hair Color:
Black

Hair Length:
Short

* * *

Accent:
West Indian French

* * *

Clothing Description:
Short black leather jacket, Light blue jeans, black sneakers

* * *

List Additional Victims & Witnesses — (Reconstruct Occurrence including Method of Entry & Escape — include Unique or Unusual Actions:

Complainant present at the 114th Pct., states that at t/p/o, a male Black entered the place of business and pretending to be a customer, asked to see the above described items of jewelry. The male spent approximately 15 to 20 minutes in the store before he produced a small canister of mace and sprayed complainant and witness in face. The perpetrator at this time fled the store with the complainant in pursuit. He ran in the direction of Astoria Blvd., where complainant lost sight of him. [redacted] complained of a burning sensation in [redacted] face at the time of the incident, however, at time of report, [redacted] refused medical aid.

Latest Print Team:
☐ Yes ☒ No

Crime Prevention Survey:
☐ Yes ☒ No

Complaint Report Prepared By:
CALANTJIS, S.

Title:
POLICE OFFICER

Command:
114 RIP

Name Printed:
CALANTJIS, S.

Tax Registry No.:
879401

Command:
114 RIP

* * *

BOROUGH ROBBERY SQD CASE # 92/91

SP 0068-91 **PART AA-2**

SUPREME COURT
QUEENS COUNTY
CRIMINAL TERM

The People, etc.,
vs

Defendant
IMO
SHERMAN WALKER

* * *

ATTY.
s/ Robert Schwartz 18B

Adjournments

PART	DATE	REMARKS	PART
AA2	5-22-91	O.S.C. (LINE-UP)	GRAND

Petition for Writ of Habeas Corpus

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Indictment # *2120/91*

THE PEOPLE OF THE STATE OF NEW YORK,

– against –

SHERMAN WALKER

Defendant,

AFFIRMATION

MICHAEL P. JOSEPH, being duly admitted to practice law in the State of New York, hereby affirms under the penalties of perjury as follows:

1. I represent SHERMAN WALKER in the above encaptioned matter.

2. I previously filed an omnibus motion seeking a variety of relief including the suppression of the identification take took place at a lineup and any in-court identification of the defendant.

3. In my previous affirmation, I set forth relevant facts regarding the lineup that took place in reference to the instant indictment. As stated in said affirmation, the defendant Walker was represented by your affirmant in a case pending in Queens County at the time that he was placed in the lineup. In spite of this fact, your affirmant was not notified or given an opportunity to appear at said lineup.

4. Based upon the Voluntary Disclosure Form provided herein, it appears that the lineup that took place was compelled by court order. This fact, among others caused the defendant's right to counsel to attach. *People v. Jackson* 74 NY 2d 787.

5. The right to counsel is not satisfied by merely appointing a member of the bar. An accused has the right to have his own attorney representing him at any critical stage. I am informed by my client that he stated at said lineup that he was represented by your affirmant and therefore wanted to be represented at the lineup only by your affirmant.

6. In that I represented Sherman Walker on another pending case, and in that he requested that I be present, I should have been allowed the opportunity to appear as Mr. Walker's counsel at said lineup. *People v. Coates* 74 NY 2d 244.

WHEREFORE, your affirmant prays for the relief sought in the motion previously submitted or for any other relief that this court may deem just and proper.

DATED: May 22, 1991
New York, New York

s/ Michael P. Joseph
MICHAEL P. JOSEPH